The

ARBITRATION JOURNAL

RTERLY OF THE AMERICAN ARBITRATION ASSOCIATION

Volume 10 n.s., No. 1 1955

ARBITRATION JOURNAL

VOL. 10 (NEW SERIES) 1955 NUMBER 1

The Arbitration Journal is published quarterly by the American Arbitration Association, Inc.: Sylvan Gotshal, President; Whitney North Seymour, Chairman of the Board; J. Noble Braden, Executive Vice President; A. Hatvany, Secretary-Assistant Treasurer. Annual subscription: $4 in the United States; $4.50 elsewhere in the Western Hemisphere; $5 foreign; single copies $1.50.

A

T

Ja
U
C
Y
or
th
T
ar

la
se
w
tra
to
sc
en
w
ab
ag
Pr
ta
ma
th

ca
ag
lat
ch
in
co
eve

AN EDITORIAL

THE ARBITRATION JOURNAL is privileged to publish in this issue two important papers, "The Ability Factor in Labor Relations," by James J. Healy, Associate Professor of Industrial Relations at Harvard University, and "Arbitration of Security Risk Disputes," by Benjamin C. Roberts, New York attorney and former mediator of the New York State Mediation Board. These timely contributions to clarity on the role and function of grievance arbitration were delivered at the 1955 annual meeting of the National Academy of Arbitrators. The *Journal* is indebted to the Academy for permission to bring these articles to the attention of our readers.

Professor Healy's paper is based upon preliminary findings of a large-scale research project at Harvard to determine the effect of seniority clauses on ability as a factor in promotion of industrial workers. In beginning this project, the researchers studied 58 arbitration awards in which the claim of a senior employee was upheld to a job to which management had first advanced a junior. Harvard scholars communicated with each company and found that the senior employees who were given the jobs in accordance with the awards worked out well, in some cases meriting further promotions, in just about the same proportion as employees who were promoted on management's judgment of "merit" alone. With true scientific caution, Professor Healy refuses to "dignify" his paper by the label of "tentative conclusions," but the moral is inescapable that "the facts marshalled thus far do not justify any conclusion that arbitrators are the prime culprits in the waning role of the ability factor."

The paper by Mr. Roberts sheds light on a problem which has caused much anxiety among thoughtful leaders of labor and management. At first glance, it might seem paradoxical that industrial relations specialists should be so concerned with "security risk" discharges, a type of dispute which has produced relatively few cases in arbitration. On closer inspection, however, it is evident that deep concern has not been misplaced. Public discussion—and in some cases even court decisions—on arbitrators' awards which ordered reinstate-

(*Continued on Page* 64)

AMONG OUR CONTRIBUTORS

JAMES J. HEALY is Associate Professor of Industrial Relations at Harvard University and one of the leading arbitrators of labor-management disputes. He was Vice Chairman of the Regional War Labor Board for the New England Area during World War II and has frequently been appointed to fact-finding and arbitration boards in disputes of national importance.

BENJAMIN C. ROBERTS, an attorney, is one of the most active arbitrators in the New York area and is named as permanent umpire in many labor-management contracts. His paper on arbitration of security risk discharges is the result of several months of study and research undertaken at the request of the National Academy of Arbitrators.

ALBERT S. DAVIS, JR., an attorney, is the Resident Counsel of Research Corporation, and Adjunct Professor of Industrial Engineering at New York University. He is author of a forthcoming book "Profitable Patent Licensing." The article on patent arbitration in this issue of *The Arbitration Journal* is an expansion of an address he recently delivered at the Philadelphia Patent Law Association.

RUDOLF GOLDSCHEIDER, a graduate of Harvard Law School, is now working on a Fulbright Scholarship project with the United States Educational Foundation in Norway. He credits Judge Gunder Egge of the Norwegian Court of Appeals and Mr. Erling Sandene of the Norwegian Ministry of Justice for helpful suggestions in the preparation of his article on the enforcement of American awards in Norway.

THE ABILITY FACTOR IN LABOR RELATIONS*

James J. Healy

There is a growing conviction expressed by many persons that the ability of an individual employee is no longer of much significance in determining his status. The policies developed through collective bargaining are attacked on the ground that there is no incentive for a man to use his initiative when he is restricted in advancement by seniority rules and practices, that seniority provisions make it difficult, if not impossible, for the young, ambitious employee to move ahead rapidly on the basis of merit or performance.[1] From these assumptions the further, dark conclusion is drawn that productive efficiency will be impaired and society's material standards will suffer.

It is surprising that our researches into the field of labor relations have progressed so far without any systematic and empirical analysis designed to test the validity of these pessimistic views. A review of the literature suggests that there has been too much preoccupation (in research endeavors) with the principle of seniority and far too little attention given to the factor of employee ability. Given our knowledge of the field at this time, to what extent can we make even informed guesses concerning the answers to the following questions:

(1) Does individual employee ability play little or no part in determining his economic and social role in the work community?

(2) If the ability factor is of less significance, is this to be attributed largely to the emphasis upon seniority under union policies and collective bargaining agreements?

(3) To what extent is there a correlation between an employee's length of service and ability?

(4) What meaning is to be given to the concept of ability? Obviously it is a word of many meanings and many dimensions.

---

* A paper prepared for delivery at the annual meeting of the National Academy of Arbitrators, 1955.

1. *Individual Initiative in Business,* Edited by G. H. Allen, Harvard University Press, 1950, p. 150.

To what extent should the meaning employed in personnel policy and collective bargaining vary from one situation to another? Should the test of ability mean one thing in deciding lay-offs, another in making promotions or wage increases within rate ranges, and still another in deciding whether an employee is unfit for continued employment?

(5) Is it proper to differentiate between types of industries or between types of jobs in deciding what weight shall be assigned to employee ability?

(6) Is recognition of individual employee ability a strong motivating force, one which stimulates a man to greater effort and nurtures initiative? Is it a stronger psychological force than recognition of a man's length of service?

(7) Finally, what evidence is there that the growth of the seniority principles—if it has been at the expense of the ability determinant—has harmed industrial efficiency?

These are only a few of the questions which must be answered before we can affirm or deny the generalizations of those who claim that present day labor relations policies tend to destroy individual initiative. Several months ago a research project was started on this subject at the Harvard Business School. It is obvious that such a study will require many more months before even tentative conclusions can be suggested. Therefore, some of the observations presented in this paper cannot even be dignified by the label of "tentative conclusions." They are defended only on the terms expressed by Montaigne, when he said:

"All I say is by way of discourse, and nothing by way of advice. I should not speak so boldly if it were my due to be believed."

—I—

There is little doubt that the personal abilities and qualifications of an employee do not play a predominant part in determining his status within the unit covered by a labor-management agreement. During the last two decades there has been a decreasing wage recognition of differences in ability among employees on the same job. In part this has been caused by the success of Unions in substituting single rate payments for rate-ranges. Such success in no small way was attributable to Union allegations or proof that within-range merit increases were less a function of *bona fide* variations in ability than of favoritism and discrimination; or Unions were able to argue persuasively that no Company could measure the subtle variations of

ability reflected by the distribution of employee rates within the range. In part, the war years and the policies pursued voluntarily by employers or those adopted by the War Labor Board did much to emasculate the "merit" or "ability" connotations of rate range movements. Notwithstanding wage stabilization regulations, many employers hired new people at the mid-point or the maximum of the range, and such payments did not reflect greater skills or experience on the part of the new hires. Similarly, tight labor market conditions developed pressures for automatic progression within the rate range, at least to the mid-point and in some cases to the maximum. It is true that incentive systems of payment reflect individual difference in effort, but in the main, the payment of an employee on a given job is less influenced by his ability and merit.

At this stage of our investigation a review has been made of 85 uninterrupted bargaining relationships over the period 1940 through 1953. In 52 of the 85 relationships, there has been at least one contract language change which has the effect of reducing the consideration of ability in making layoff or promotion decisions, thereby enhancing the importance of seniority. Most of these changes affected layoff procedures; of 76 contract changes in these 52 relationships only 13 involved promotions within the bargaining unit. In 8 of the 85 contract histories studied, language changes were made which can be construed as strengthening the influence of individual employee ability. It is recognized that language *per se* is not an entirely accurate guide to trends in the influence of the ability factor; the application of such language on a daily basis is much more significant, and, in fact, such application more often than not is difficult to reconcile with the contract language which governs the action. But an informed guess can be made that ability has become progressively less determinative than length of service in deciding which employees are to be retained in a layoff period; the ability factor—by the test of contract language—does continue to play an important part in promotion decisions.

— II —

One of the major difficulties encountered by management in its attempt to preserve the ability criterion is the inherent vagueness of any contract expression to describe the criterion. The isolated terms of "ability," "qualifications," "qualified to do the work," "satisfactory experience" and the many others now used in layoff and promotion clauses mean many things to many people, and may have

different meanings to the same person, depending upon the situation involved. The relatively precise meaning of seniority, by comparison, gives it an immediate advantage. It is the fashion in academic circles today to preface chapter headings with relevant—and even irrelevant—quotations from "Alice in Wonderland." It is appropriate to recall the brief interchange between Alice and Humpty Dumpty on the meaning of words:

> "When I use a word," Humpty Dumpty said in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."
>
> "The question is," replied Alice, "whether you can make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

In the early days of collective bargaining, management could use the word "ability" with little fear of its being watered down by grievance discussions or by an arbitration decision. Many contracts specified that the determination of the relative abilities of employees, particularly in the making of promotions, was the exclusive judgment of management and only if the judgment was clearly discriminatory could it be subject to challenge. In a real sense management was the "master" of the meaning of the word "ability," and the word meant just what management chose it to mean at any given time. Indeed, this very mastery of the meaning undoubtedly contributed to the present low status of the ability factor. To illustrate: one of the most interesting cases discovered in the historical analysis of contracts was that of a Company and Union which had incorporated the following promotion clause in their initial bargaining agreement in 1943:

> "In all cases of promotion of employees from one classification to another, the factor of ability, as determined solely by management, shall govern. If in management's judgment the ability of the men under consideration is relatively equal, seniority shall govern."

Presumably the clause worked reasonably well until 1945 when the Union charged discrimination by the Company in the exercise of its judgment. The Company had promoted a junior employee to the position of fireman, first class, even though a senior applicant had some part-time satisfactory experience on the job. The Union argued that in other promotions, such experience was given considerable weight by management. The Company agreed, but said that in this case it could not be satisfied by demonstrated ability to do the spe-

cific work in question; it was more concerned with a man's potential promotability to an engineer's position. In essence, it was admitting to the use of two different meanings of the word "ability." Rightly or wrongly, the arbitrator found this to be discriminatory application of the clause and the Company's decision was reversed. In the 1946 contract all references to management's sole exercise of judgment as to ability were deleted.

More and more the parties jointly have become masters of the meaning of the word ability, and if the relationship pattern is that of cooperation or accommodation—to use Dr. Selekman's helpful categories—disputes are infrequent. But even this optimistic evidence is misleading and should not be interpreted to mean that the ability factor necessarily is better protected in such an atmosphere. One industrial relations director is quoted as saying:

> "The Union is constantly pressing for more consideration for seniority. The infrequency of union grievances on this score is misleading. Actually, operating management gives in to the union pressure many times, because of the difficulty of proving greater ability and in order to avoid a fight with the union. I'm convinced that in many of our promotions seniority gets more consideration than either merit or ability—the clause in the contract notwithstanding."[2]

Perhaps to an even greater extent arbitrators have become the true masters of the meaning of this word "ability" as used in the contract clauses. It is suggested cautiously that the influence of arbitration awards helps to explain the continued decline in the consideration of ability. *First,* there is a tendency among arbitrators—whose jurisdiction to decide the question of relative abilities is established by the contract—to join with the Union in the overemphasis of seniority, even though seniority is to govern only when ability is relatively equal. This is understandable, given the objective quality of seniority *vis-a-vis* the normally subjective nature of the ability measurement. One always feels more secure with the tangible and familiar guides. *Second,* arbitrators have tended to transfer the locus of the burden of proof to management, perhaps far more than the contract language intended it to be transferred. *Third,* there are those arbitration opinions which lend to standard language an interpretation which would frustrate the most well-intentioned management. To illustrate: it has been held that unless an employee is proved to

2. Chamberlain, Neil W., *The Union Challenge to Management Control,* p. 281, Harper & Bros. 1948.

be "head and shoulders" above the senior employee in ability, he is not entitled to promotion under a clause which reads:

> "In the advancement of employees to higher paid jobs when ability, merit and capacity are equal, employees with the longest seniority will be given preference."

Others have held that "ability" can only be measured or tested by an actual trial period on the promotional job, irrespective of complete contract silence on this right and an absence of past practice implying such right. These predilections of arbitrators—as word masters—do not provide a favorable climate for the employee ability factor.

— III —

Nevertheless, the facts marshalled thus far do not justify any conclusion that arbitrators are the prime culprits in the waning role of the ability factor. On the contrary, their decisions, if carefully studied in retrospect, are a most useful clue to the real cause of the problem. Further, it is submitted that the Union preoccupation with seniority is not the cause of the problem, if a problem is assumed to exist. Three facets of the research which has just been started suggest some interesting propositions:

(a) Fifty-eight arbitration awards were investigated in which the arbitrator had set aside management's decision to promote a junior employee over a senior employee on the basis of superior ability. No decision was less than three years old at the time of investigation. Inquiries were sent to the Companies involved asking for a work history of the senior employee since his grievance was sustained and for an objective statement of whether he had proved able in the higher position. It can be assumed that any bias would be in the direction of a confirmation of the Company's original position. Forty-six written or verbal responses have been received, and in no less than 29 the senior employee is said to have proved himself able on the new job either immediately or within a very short period. Even more significant is the frank statement in 22 of the 29 cases that supervision doubts whether the junior employee originally favored by management would have done any better on the job. In 16 of the 29 cases the senior employee has advanced subsequently to still higher-rated jobs.[3] In only 10 of the 46 cases does management assert that the arbitrator's decision was unsound. In the 7 remaining cases no

3. The influence of the Korean war period tight labor market may explain some of these additional promotions. Further study is needed to determine this.

judgment could be given because of demotions in lieu of layoff or voluntary quits shortly after the arbitrator's decision was rendered.

It would be tempting—but wrong—to draw the facile inference from these data that arbitrators possess a special insight which is not available to management. The qualitative analysis of these replies is more meaningful than this brief quantitative study. Unfortunately the time is too limited to discuss the qualitative analysis. Several explanations may account for this reassuring record. It may be that management was entirely correct in its original judgment concerning the superior ability of the junior employee; but it erred in relating this ability to the job in question. Some industrial relations directors claim that the arbitration proceeding itself was helpful in changing the attitude of the senior employee; it gave the company an effective opportunity to highlight his shortcomings, and when the arbitrator sustained his claim to the job the employee decided to prove to everyone concerned how good he was. A few replies highlight the very subjective nature of ability determination; for example, a few companies explained that the present appraisal of the relative abilities of the senior and junior employees was made by a different supervisor. One company stated that the former supervisor might have been correct in his judgment and the successor supervisor might be in error.

This *post-mortem* research must be extended in several additional directions. For example, it would be interesting to know how successfully the junior employee performed when his assignment to the higher job was sustained by the arbitrator. Further, what was the effect on the junior employee's morale when the job originally given to him was taken away by an arbitrator's verdict? Did his performance suffer thereafter? Was his relationship with the Union harmed?

(b) Some research has been started to determine the percentage of promotions in which the senior person was selected in organized and unorganized firms. Three metal trades firms of approximately the same size have been studied for the period of 1951 through 1953; two were unionized and one was not. In the two unionized firms 81% and 86% respectively of the persons promoted were the senior bidders for the jobs. Interestingly, in the firm which had no union, 83% of the persons promoted were senior employees. Obviously the unit of seniority could influence the interpretation of these data, but on the basis of the inquiries made there is little reason to impute to this variable any significance. These preliminary findings suggest that the criteria for promotion in the unorganized Company are not

very different from those used in the unionized Company. This may be a function of the tendency in recent years for non-union companies to follow closely the practices of unionized companies. However, the data suggest one of two things: (a) that in an industry in which semi-skilled jobs predominate, there is a high correlation between ability and seniority or (b) that the clearly discernible differences in ability among a large group of employees is so slight that they do not govern the selection of persons for promotion.

(c) A third research approach indicates a high correlation between arbitration verdicts favoring the Company's promotion of a junior employee and the presence of an orderly program for periodic review of employees. Conversely, where ability is appraised on an *ad hoc* basis—at the time of a promotion—the chances of convincing an arbitrator of the junior employee's superiority are less. This does not mean that the gadget-conscious employer can develop the ability factor by the simple device of installing a so-called "scientific" merit-rating system. No such infallible system has been devised. It does mean, however, that a systematic and well-administered merit rating program can "make a very worthwhile contribution" as an *additional* source of information; it has real evidential value to an arbitrator.[4]

* * *

In his book, *Challenge of Industrial Relations,* Sumner Slichter has stated:

> "The determination of merit is a responsibility of management. Merit will obviously differ in various situations. An important aspect of merit is a man's adaptability to the people with whom he must work. Will he be a good member of a team? Will he add the proper qualities to the team? Will he improve the balance of the team? Managers are in the best position to answer these questions. Indeed, that is what they are hired for. The requirement that promotions be based on seniority deprives managers of the opportunity to exercise some of their most important skills."

Slichter goes on to say:

> "Incidentally, disputes over whether A or B is the better man for a job do not present the kind of question which should be referred to arbitration. That would merely be asking a neutral who is not necessarily skilled as a manager and who cannot begin to

4. Shaeffer, Robert E., *Merit Ratings as a Management Tool,* Harvard Business Review, Vol. XXVII, November 1949. See also *Rating Employee and Supervisory Performance,* American Management Association, 1950.

> master the facts in the case, to substitute his judgment for that of management—in other words, to replace the judgment of a professional with the judgment of an amateur. . . ."[5]

This paper in no way questions the soundness of the basic tenets expressed by Professor Slichter. One would have to agree that management is in the best position to establish equitable criteria for the measurement of ability and to apply such criteria in each individual case. But the research has progressed to a point where one can question the professionalism of the judgments made by management. Very seldom are promotion clauses based on straight seniority. If they tend to operate in that manner, however, it is not necessarily the fault of the clause or the fault of the irrational union pressure or the fault of an arbitrator's less professional judgment. Each of these undoubtedly contributes to the superior status of seniority. But we should be equally alert to the lack of skills, the imperfect application of skills, the outright defeatism on the part of managers in their efforts to assign proper weight to the employee ability factor. Perhaps even more important, we should face up to the question of whether the gradual decline in the emphasis upon ability is nothing more than a realization that the factor is of little significance, as measured by the tests of productive efficiency, incentive, and employee morale and equities. It is interesting that the very assumption which gave rise to this research endeavor has itself become suspect during the investigation.

5. Slichter, S. H., *The Challenge of Industrial Relations,* pp. 37-8, Cornell University Press, 1947.

PROCEEDINGS OF INTERNATIONAL TRADE ARBITRATION CONFERENCE SOON TO BE AVAILABLE

An International Trade Arbitration Conference of unusual interest to lawyers and businessmen, took place in the Great Hall of the New York Chamber of Commerce on March 23. The all-day gathering was sponsored by the American Arbitration Association, the New York Chamber of Commerce, and the Graduate Schools of Business Administration of Columbia and New York Universities.

Among the speakers were Samuel C. Waugh, Assistant Secretary of State for Economic Affairs; Dr. Carlos Davila, Secretary General of the Organization of the American States; Dr. Joseph E. Johnson, President of the Carnegie Endowment for International Peace; William L. Batt, former President of SKF Industries, Inc., and chief of the ECA mission to Great Britain; and Whitney North Seymour, President of the American Arbitration Association. In the afternoon session, a panel of 14 representative experts answered questions on practical aspects of world trade arbitration, indicating solutions to problems growing out of the use of arbitration clauses, selection of arbitrators, and enforcement of awards in the United States and abroad.

A full stenographic record of the proceedings was taken for publication in booklet form. Copies will be sent to those who paid the registration fee. A supply of the printed proceedings will also be available, at a price to be announced later, for those who were not able to participate in the conference but who would like to have the printed record.

Readers of the Arbitration Journal who wish to reserve copies may write to the American Arbitration Association, 477 Madison Avenue, New York 22, N. Y.

ARBITRATION AND SECURITY RISK DISPUTES*

Benjamin C. Roberts

Under this subject matter we are interested in the problems confronting the arbitrator in two types of proceedings flowing from the allegation that an employee is an industrial security risk. The first type is a sequel to cases processed under the government industrial security program. Here the denial of opportunity for continued employment either at the worker's regular job or anywhere in the plant follows a refusal to grant clearance by the appropriate governmental agency or from a revocation of a prior clearance by a governmental agency. The second type is an original proceeding dealing with whether or not there was a just cause for the action taken against an employee. The second type may or may not also involve the question of security risk.

To establish a proper frame of reference, I must assume, with apologies, that a review of the government industrial security program as it affects the personnel of contractors or subcontractors for a military procurement agency will not be amiss, but I hope, helpful. What do the industrial security regulations call for, and what problems confront the arbitrator within his delimited scope of authority in an arbitration proceeding that involves the denial or revocation of clearance in a plant which has classified government work?

Classified Security Information

Let us first look at the meaning of industrial security as stated in the uniform Joint Regulations of the Armed Forces issued under the National Security Act of 1947, as amended (18 FR 6528, October 14, 1953). It is defined as concerned with the effective protection of classified security information in the hands of United States industry, and with resources, premises, utilities and industrial facilities essen-

* A paper read at the annual meeting of the National Academy of Arbitrators in Boston, Mass., January 28, 1955.

tial to support a mobilization program from loss or damage by elements, sabotage, or other dangers arising within the United States, "except armed insurrection and other serious disturbances which require the use of organized military forces to restore domestic tranquillity."

The current Presidential Executive Order on the subject (10501), effective December 15, 1953, and entitled "Safeguarding Official Information in the Interests of the Defense of the United States" (18 FR 7049) has decreed that official information which requires protection in the interests of national defense is to be limited to three categories. In a descending order of importance, they are: Top Secret, Secret and Confidential. The respective classifications of information are to be designated by the appropriate authority.

Top Secret is defined as information or material which requires the highest degree of protection, "the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave danger to the Nation." *Secret* is defined as, "All information and material, the unauthorized disclosure of which could result in serious damage to the Nation." *Confidential* is defined as, "All information and material, the unauthorized disclosure of which could be prejudicial to the Defense Interests of the Nation."

To round out our definition of terms there is "Classified information," which as used in the Manual governing the conduct of employers having defense contracts, covers all three (3) types and means official information which requires protection in the interests of the national defense. The authority to slot defense information into the proper category is limited to the Departments or agencies of the specified executive branch that is handling the contract.

The Security Agreement

Every contractor for supplies or services with the government, through the Department of the Army, Navy, and/or the Air Force, must enter into a "Security Agreement" with the Department of Defense (Form DD 441). It defines and sets forth the precautions and specific safeguards that must be taken by the employer to preserve and maintain the security of the government, through prevention of improper disclosure of classified information derived from matters which affect the national defense, sabotage, or any other act which might be detrimental to the security of the United States. The contractor undertakes to maintain security controls in accordance with the requirements of the "Industrial Security Manual for Safeguarding

Classified Information," which is made a part of the Security Agreement.

Additional agreements may be made to adapt the Manual to the employer's business and the necessary procedures thereunder. Each contractor must also prepare a "Standard Practice Procedure" for its own use, consistent with the Manual. The government, in turn, undertakes to notify the contractor of the security classifications of the supplies, services, and other matters to be furnished by the employer to the government or by the government to the employer. There is also provided that security classifications are to be assigned to the least restrictive category, consistent with the proper safeguards.

As a matter of public policy, unions and employers must recognize that this "Security Agreement" must be superimposed upon their collective bargaining agreement, which, in turn, must be viewed as being modified to the extent that this contract with the government proscribes the employer's discretion in the employment or continued employment of employees on classified information and who are subject to the requirements of the Manual. Job security clauses in union contracts must be read with consistency. It follows that arbitration similarly must be excluded from areas encompassed by the "Security Agreement" and the Manual incorporated into it by reference. Consequently, we must explore the Manual and the underlying regulations before permitting ourselves to arrive at any conclusions as to the scope of authority of an arbitrator hearing matters affecting employees who have been denied security clearance or have had such clearance revoked.

Security Requirements

The term "security" as used in the Manual refers to the ". . . safeguarding of information classified by the Government as Top Secret, Secret, or Confidential against unlawful dissemination, duplication or observation because of its importance to national defense." The employer must determine which of his employees requires possession of or access to any element of the classified information under his control, and must prevent supply or disclosure of such information to any unauthorized person. The requirement of clearance for an individual results from the employer's determination of the employee's need for access to classified information in the performance of his assigned duties.

Under Section 6c. of the Manual, the employer must exclude from any part of his plants, facilities, or sites at which classified work is being performed, any person or persons designated in writing

by the Secretary of the Military Department concerned, or his duly authorized representative. Significantly, it also parenthetically adds that: "this does not imply the dismissal or separation of any employee."

It is the obligation of the employer immediately to submit to the security office of the cognizant military department a confidential report of any information coming to his attention concerning any of his employees having access to classified information, or who are in the process of being cleared for such access, if the information indicates that such access is not or would not be clearly consistent with the interests of national defense. Access to classified information can only be had by an individual after clearance by the government or the employer, as the case may be, and then only to the extent of the clearance.

Security Clearance, Denial and Revocation

The Personnel Security Clearance is an administrative determination that the employee is eligible from a security point of view for access to classified security information in the same or lower category as the clearance is granted. An Interim Personnel Security Clearance is granted on a lesser standard.

Personnel Security Clearances are the responsibility of the contracting military department, except for those requiring access only to confidential information. Employees other than immigrant aliens doing work in this category must be cleared by the employer upon the finding that the individual's employment records are in order as to citizenship, and that ". . . there is no information known to the Contractor which indicates that the employee's access to Confidential information is not clearly consistent with the interests of National Security." The employer may not deny a personnel clearance of an employee. This authority is reserved by the government. Moreover, the employer has no authority to revoke a clearance once it has been granted.

In the event that derogatory information is obtained during the course of an investigation, the military department cannot deny or revoke a clearance to an employer's personnel, except in an emergency situation. Other than in an emergency, the military department may recommend a denial of clearance, based upon the disclosure of derogatory information, to the regional Industrial Personnel Security Board. The emergency is defined in the Joint Regulations of the Armed Forces as, "any situation in which a failure to act until the

above authorization is obtained presents a serious threat to the security interests of the United States."[1]

If an employee is denied clearance, or it is revoked, the employee and the employer may appeal such action to the Industrial Personnel Security Board concerned. He has a right to a hearing at which he may be represented by counsel or other representative.

At this point, it may be recalled that under the "Security Agreement," the Manual provisions alone are not necessarily controlling. There may be an additional agreement between the Military Department and the employer. Consequently, where the question arises as to whether or not a person is being denied access to classified information in accordance with the procedures required under the "Security Agreement," inquiry may be made into whether or not there are additional or lesser security safeguards required based upon any supplementary agreement between the government and the employer.

---

1. On February 2, 1955, the Secretary of Defense approved the "Industrial Personnel Security Review Regulation," effective sixty (60) calendar days thereafter, prescribing uniform standards and criteria for determining eligibility for access to classified information, and establishing administrative procedures in cases where a military department or activity thereof had recommended or determined a denial, suspension or revocation of a clearance or a denial or withdrawal or an authorization for access by certain other individuals. It established an Industrial Personnel Security Review Program consisting of the Office of Industrial Personnel Security Review, The Industrial Personnel Security Screening Board, The Industrial Personnel Security Hearing Boards and The Industrial Personnel Security Review Board.

Cases involving recommendations by an activity of a military department that clearance be denied or revoked or where a clearance was suspended by said activity, among others, must be forwarded to the Director of the Office of Industrial Personnel Security Review who will forward them to the Screening Board for appropriate action in accordance with the prescribed standards and criteria. A favorable determination at this stage must be unanimous. If the security finding is unfavorable to the person concerned, a Statement of Reasons will be forwarded to him with opportunity to reply and to request an appearance before a Hearing Board in person and/or by counsel or a representative of his own choosing. In cases in which the Director is satisfied with the record and there is a unanimous determination by the Hearing Board, its determination is final. If the determination is not unanimous, the case must be forwarded to the Review Board. The Director may also forward any cases presenting novel issues or unusual circumstances. The Secretary of Defense or the Secretary of any military department or the Director may request consideration by the Review Board. Reconsideration by the Hearing Board also may be requested by the Director on newly discovered evidence or other good causes shown.

The Review Board will review a case on the written record and may adopt, modify or reverse the Hearing Board. Its determination is final, subject to reconsideration in its own motion or upon request of the person concerned to the Director based on newly discovered evidence or other good cause shown, or at the request of the Secretary of Defense or the Secretary of any military department. The Review Board may be reversed by the Secretary of Defense or by joint agreement of the Secretaries of the three military departments at the request of one of them.

Scope of Review in Arbitration

Where employment is affected by a failure to obtain security clearance or where said clearance is revoked, it would appear that the first avenue of review may be whether the employer's discretionary determination of an employee's need for access to classified material was proper. If so, an arbitrator must ascertain whether or not the denial or revocation was in conformance with the Manual, or with any supplementary agreement between the employer and the government, with appropriate reference to the underlying regulations. If clearance was not denied or revoked pursuant to the processes prescribed by the government, as contracted under the "Security Agreement" and supplements, if any, the employer's failure to permit an employee to work at his regular job or elsewhere in the plant may create the task of determining whether this was violative of the job security provisions of the collective agreement. The elements that might be considered in such an instance are similar to those that will be discussed below in connection with the second type of case to which reference was made earlier.

Turning to a submitted dispute in which a clearance is denied or revoked in accordance with the requirements of the "Security Agreement," it is clear from the Manual in Section 6c., that this does not compel an automatic discharge or separation. Obviously, such employee cannot be permitted to work on classified material or information, nor can he have access to classified security information. Access had been defined in the Manual as, "The ability and opportunity to obtain knowledge of classified information." The underlying regulations state: "An individual does not have access to classified security information merely by being in a place where such information is kept, provided the security measures which are in effect prevent him from gaining knowledge of such classified security information."

The security measures that must be taken are set forth in the Manual under Sections 22 and 23. Areas containing material classified as Top Secret or Secret must be designated as "Closed Areas." They must be segregated or separated from adjacent areas by a physical barrier which prevents observation or entrance by unauthorized individuals. Admittance must be controlled by the posting of guards at all unlocked entrances during working hours. During nonworking hours entrances and exits must be locked and armed guards on patrol. Personnel assigned to the area must challenge the presence of unauthorized individuals.

Confidential material must be in areas defined as "Restricted Areas." These also must be segregated by physical barriers to prevent observation or entrance by unauthorized individuals, and the assigned personnel must challenge the presence of unauthorized individuals, but admittance during working hours has to be controlled by employer-authorized personnel at unlocked entrances and in non-working hours, entrances and exits must be locked and patrolled. Areas not falling within the above, or those containing classified material which is not accessible, are labeled "Open Areas." These need not be segregated or separated.

It now becomes clear that, in essence, where persons have been denied clearance or have had clearance revoked, and where a discharge is not justifiable on other grounds, the function of the arbitrator generally is to determine whether or not there are "Open Areas" in the plant, areas in which there will be no access to classified information, to which the grievant can be assigned for employment. This is a factual question with variations in set-up probably equal to the number of plants that may be involved. It must be examined with great thoroughness by the arbitrator. This, of course, imposes upon him a somber responsibility.

It is interesting to note the following language in Section 22 of the Manual: "Industrial plants *may* be divided into the following areas as circumstances require:" (Emphasis added). The three (3) categories of areas are then listed. This language would seem to imply that discretion in the designation of areas may be left with the employer, but that exercise of discretion may be questioned later.

If it is found that there is work in "Open Areas" that can properly be assigned to the employee, other correlative questions may arise. They could involve problems of crossing classifications, rate of pay, seniority and a host of others flowing from the various provisions of the particular contract. Does this employee continue to accrue seniority in his previous job if there is a cross classification transfer? When work becomes available for him in his regular classification is he to be returned with accrued seniority? Does his seniority under his original classification apply to the classification in which the work is available for him? Presuming that some junior employee must be bumped in order to permit him to be assigned to non-classified work in an "Open Area," and it results in a downgrading or a lay-off or both, what are the rights of the affected individuals? Should they be permitted to suffer a loss of employment or a lay-off through no lack of work or without fault of their own or of the

company's doing, but solely due to another employee's failure to meet the necessary standards required to perform his regular work? These are only some of the provocative problems that must be encountered.

Finally, there may be tangential dilemmas created by adverse employee reaction to the retention of certain employees. These dilemmas may advance issues other than government relationships, as will be seen in cases discussed below.

Assuming there is no available work for the employee denied clearance or having his clearance revoked, what shall his status be? Should it be that of a laid-off employee, because there is no work available for him that he can perform? Is he a suspended employee because he has failed to meet a newly imposed condition of employment? Does he go on a leave of absence? Can he be discharged because there is no anticipation that his services will be required for a sustained period of time in view of the employer's long term government contracts? These are questions that have accompanying implications arising out of the terms of the collective agreement. These problems involve substantive rights as well. They cannot be answered in the abstract. They must be dealt with as they arise—in the light of the individual union contracts, and under the circumstances as they are found in each case.

There is a paucity of reported arbitration cases on these problems so that no adequate analysis of current arbitration thinking can be made available. It is virgin territory challenging original thinking and presents much food for objective and provocative discussion.

Discharge For Just Cause—Employee Unrest

There have been some published arbitration cases, but relatively few in number, that concern themselves with so-called "Security Discharges," although not premised upon any "Security Agreement" requirements. An example is the matter of *Jackson Industries, Inc., and the United Steel Workers of America, Local 2815 (CIO), (March 1, 1948—9 LA 753)*. The Local's President was charged in a local newspaper with being a member of the National Committee of the Communist Party and active in soliciting Party membership. A few days later a second article reported that he and others had been ousted from the Local Industrial Union Council after a Council investigation. None of those involved denied their Communist leanings. Additional newspaper articles reported the controversy over the ouster.

Resentment against being compelled to work with the former

Local President arose among employees in the plant and increased as a result of the articles. There was talk of resignations and walkout. An employee petition was presented to the company requesting his discharge. After the discharge a second employee petition was presented to the company opposing reinstatement. At the arbitration hearing the discharged employee was not charged by any witness with being a Communist and in his testimony the discharged employee did not state whether he was or not. Neither party treated it as an issue.

The reason assigned by the Company for the discharge was the unrest and disturbance created in the plant as a result of the newspaper articles. The arbitrators sustained the action and emphasized that the termination was not because of charges made against the grievant, but because the charges, the report of his ouster from the Council and the continued publicity caused dissension in the plant, tended to disrupt morale and production, and brought about demands from employees, including Union members, that he be discharged.

Addressing themselves to the argument that this permitted a simple expedient for a company to rid itself of an employee, the arbitrators counseled that there were laws to protect persons from libel and slander, and that the dismissed employee had nearly four months from the appearance of the first article and two months from the date of his discharge to obtain a retraction, and had not done so. It was held that the company was not bound to retain an employee whose presence in the plant caused, and presumably would continue to cause, unrest, dissension, and resentment which tended to incite quits, lower morale, and the consequent loss of business, and that his loss of a job resulted from the natural consequences of his own voluntary acts. The discharge was held to be for legitimate reason, ". . . the self-preservation of the Company."

Another aspect of this problem of employee unrest is contained in the comment of the arbitrator in the matter of *Chrysler Corporation, Chrysler-Jefferson Plant and United Automobile, Aircraft and Agricultural Implement Workers of America, Local 7 (C.I.O.) (October 23, 1952, 19 LA 408)*. In that case the employee who was claiming loss of pay for being sent home on one day had been mentioned at a Congressional Committee hearing as a Communist and so reported in the local newspapers. When he reported back to work there was unrest in the shop and by agreement he was permitted to pass out of the plant. He went to the Union office and made state-

ments denying that he had been a member of the Communist Party since a certain date and signed an affidavit that he was not a Communist. He reported to work the next day. The Union claimed that on that day there were no disturbances. It had taken steps to inform its membership that no action was to be taken which would interfere with the employee's return to work. It insisted that on the second day, the agitation against the employee was started by local supervision. Management maintained that a majority of the men refused to start work on that second morning because they suspected this employee of being a Communist and that when he was removed by his own consent the employees returned to their former occupational activities. The arbitrator found that the employee was not sent home as a disciplinary measure or with any intent of the company to penalize him but under the belief that his continued presence would result in trouble. The arbitrator could not conclude whether or not such trouble would have been the result since the evidence concerning the attitude of the men was conflicting. He found that tension did exist to an extent that the company's belief that serious trouble and interference might occur was understandable, but concluded that the action taken by the Company resulted in the imposition of a penalty not against those who may have threatened trouble or interference with production but against the employee who was willingly and properly performing his job which was available and for whom discipline "declaredly was not intended." He reimbursed the employee for the lost time.

Communist Reputation and Prestige

Another phase of the problem was examined in the matter of *The Burt Manufacturing Company and the United Steel Workers of America (CIO), (December 5, 1953—21 LA 532)*. The discharged employee had been a local Communist Party official, had run for local office on the Party ticket, and had resigned from office in the Union after it became necessary to sign a non-Communist affidavit to remain in office. At one time he also distributed copies of *The Daily Worker* in the plant. There apparently had been feeling against him in the plant for several years as a result of his known sympathies and suspected affiliation. In October, 1953, he declined to answer questions before the Ohio Un-American Activities Commission concerning his affiliation with the Communist Party and newspaper releases carried the story.

The company was engaged in defense work and, although the

union contended that he did not have access to classified information, a company official testified without refutation to the contrary. A poll of the employees conducted by the president of the local union showed a consensus of opinion opposing his return to employment after his discharge. Some employees testified at the arbitration hearing that violence was threatened by a number of employees if he should return.

Among other things, the arbitrators held that unless proscribed by the contract, management had a right to protect its reputation and prestige, and that no employee could jeopardize such prestige or reputation without risking discharge for just cause. The company had stated that it suffered considerable embarrassment over the unfavorable publicity, and was concerned with jeopardizing the security of its defense contracts with the government by having questionable employees in the plant. Also, that it risked financial loss from deprivation of civilian business.

The arbitrators held that a Company was in business to serve and that its profit was a result of behavior patterns which permitted it to serve competitively; that it had a responsibility to develop and maintain its good reputation among the public and that this only could be done by having work performed by capable and loyal employees; that loyalty went beyond the employer, and, ". . . is above all to our form of government in these United States." They laid down the principle that an employee must recognize that he has responsibilities as well as rights, foremost among those being loyalty to the country. Denouncing "witch-hunts," the arbitrators stressed that the discharged employee had been given ample opportunity at the hearings to state his position regarding any activity but declined to make any statement as to whether his Communist affiliations, which were part of his past, were or were not present at that time.

Communist Party Membership Per Se

In contrast to these cases, there was the matter of *Spokane—Idaho Mining Company and the International Union of Mine and Smelter Workers, Local 18 (CIO), (November 29, 1947—9 LA 749)*. There the company discharged the employee for distributing admittedly Communist literature on the company's premises in violation of a posted rule against distributing literature of any kind without the permission of the company. The arbitrator held that it did not constitute proper cause for discharge.

The arbitrator found that the discharged employee was a Com-

munist. Emphasizing his own disagreement with the economic and political beliefs of the grievant, he upheld the employee's right to hold those beliefs and express them, distinguishing this case from the government policy at the time of separating Communists from governmental positions and as officers of labor unions, where a relationship of public trust and competence was involved. He asserted that our government apparently still realized, ". . . *that labor or the right to labor is a valuable property right, WHICH SHOULD NOT BE denied* or withdrawn from laboring people because their political or economic philosophies do not accord with those of a majority of our citizens." (Emphasis included).

From the decision, it is apparent that the elements of employee unrest, dissatisfaction, or the patent threat of interruption of work resulting from retention on the job were not present. Nor were the public reputation, prestige and potential earning positions of the company referred to as being urged upon or considered by the arbitrator.

In the matter of *Consolidated Western Steel Corporation and United Steel Workers of America, Local 2058 (CIO) (November 10, 1949, 13 LA 721)*, among the causes for discharge the company alleged that the employee's behavior before a Federal Grand Jury included refusal to answer specific questions and the grounds assigned by him for this refusal, as well as the inferences derived from this behavior which indicated close affiliation with the Communist Party. In addition, some but not all additional facts in the proceedings were said to be indicative of Communist activities. In his discussion, the arbitrator stated that the real issue was whether the company may decide whether an employee is disloyal or not and take action against him on its own decision even though the employee had his rights in the job under the collective bargaining agreement.

This was a company that, in part, did vital war production. It stated that it had an established policy of employing only loyal employees. It maintained that it was entitled to demand as a condition of employment, disassociation from a criminal revolutionary conspiracy, and that it had not been satisfied by the employee's personal avowal of loyalty which was made at the arbitration hearing.

The arbitrator observed that no private company was at liberty to try, convict and punish an employee for criminal acts which were matters for the courts to decide upon and that the same was true with respect to the charge of Communism. He asserted that the charge of Communism was a very grave one and that persons sub-

jected to it were entitled to the due process and reasonable uniformities of interpretation which our legal processes afforded. He was of the opinion that the usual arbitration procedure did not provide anything approaching due process, guaranteed rights, and just uniformities which are furnished by the courts. He felt that the arbitrator should follow patiently behind the law in disciplining an employee on suspicion of Communism. Exceptions were noted by the arbitrator to the extent that an employee could be disciplined by the Company on its own judgment when there was a specific directive from the Federal Government to exclude suspected Communists or where the Company's suspicions were aroused by a violation of plant rules which would result in disrupted production, damage to property and the like? He noted that in those cases the discipline is really based on the violations of rules. A third exception was that in which prosecution for being a Communist or Communist activities of an employee were actually damaging the reputation of the company with specific harmful effects on its business.

In a very thorough and well reasoned analysis of the entire question in the *Yale Law Journal* of May, 1954, in an article on "Loyalty and Private Employment," this comment is made with respect to these cases in which membership in the Communist Party was not held to be cause for discharge:

> "The question of whether or not mere membership in the Communist Party would constitute 'good cause,' absent any showing of injury, however, remains somewhat in doubt. Arbitrators in several of the pre-1950 cases refused to allow discharges purely on that basis, pointing out that the Communist Party had not been outlawed. And one case suggested that although disloyalty might be sufficient cause for discharge, only the Government has a right to prove such disloyalty. But the Internal Security Act of 1950 and the prosecutions under the Smith Act indicate a shift in public policy toward the American Communist Party. Moreover, one state actually has outlawed that organization, and the Subversive Activities Control Board recently branded it as a 'subsidiary and puppet of the Soviet Union.' Therefore, it is possible that arbitrators today might equate membership in the Communist Party with disloyalty and hence allow discharge without proof of injury or prospective injury. Yet, in point of fact, such a case is not likely to arise. Often an employer can show actual injury resulting from employment of a publicly known Communist. And if a showing of potential injury is ac-

cepted as constituting 'good cause,' virtually any discharge of a known Communist might be so justified."[2]

Newspaper Cases

Some of the noted elements, plus the failure to deny Communist Party membership, are found in the several reported newspaper discharge cases. In the matter of the *Los Angeles Daily News and American Newspaper Guild and the Los Angeles Newspaper Guild (CIO)*, (*August 12, 1952—19 LA 39*), two editorial writers had been identified before the Un-American Activities Committee in Washington as Communist Party members. This was reported in all of the metropolitan newspapers in Los Angeles. At the arbitration hearing both discharged employees declined to answer the question as to whether they were or had ever been members of the Communist Party, although one of them was offered immediate reinstatement upon utterance of a categorical denial. The other was on the rehire list and was not actively employed by the paper at the time.

The arbitrator held that the question was not whether or not they had been members of the Communist Party, but whether or not in self-defense against anticipated serious financial repercussions from unfavorable public opinion, the publisher had a right under the contract to ask that they clear themselves of the serious charges made under oath against themselves in order to continue their em-

2. Shortly after completion of this paper, the California Supreme Court reversed a judgment confirming an arbitration award in favor of a discharged employee, on the grounds that on the undisputed evidence and findings of fact, the arbitrators exceeded their powers, that the award was contrary to law, and that it would contravene public policy as expressed in federal and state laws for the courts to enforce reinstatement of a Communist Party member dedicated to its program of "sabotage, force, violence and the like," in a plant producing antibiotics used by the military and civilians; that the award was illegal and void and unenforceable. The findings of the arbitrators that the discharge was for labor union activities was held untenable; that from the evidence and facts they ". . . were not in truth union labor activities but were Communist Party activities." It concluded that the contract would not be construed or enforced . . ." to protect activities by a Communist on behalf of her party whether in the guise of unionism or otherwise."

The dissenting justices asserted that the court had abrogated the right of employers and unions to contract for the employment of Communists as well as the right of the Communists as a class to enter into binding contracts by invoking public policy violative of legislative stated policy; that private litigation did not lend itself to solving the problem of what to do with Communists; that Congress was aware of the problem and in the enactment of the Internal Security Act of 1950 established the United States policy on employment of Communists. (*Black et al on behalf of Bio-Lab Union of Local 225, United Office and Professional Workers of America v. Cutter Laboratories, January 19, 1955, 35 LRRM 2391*. See also 15LA431, 16LA 208 and 22 LA4).

ployment with the publisher. It was found that a newspaper, being peculiarly susceptible to such criticism from the public, advertisers, subscribers and readers, differed in this respect from many other types of American enterprises; that it had, in fact, a quasi-public responsibility of printing the news and without bias. It was concluded that in the face of the accusation, the least the discharged employees could have done was to answer the charges "forthrightly," denying them if they truly could, but that they both had refused to do so.

In the United States Press Association and American Newspaper Guild (CIO), (July 1, 1954—22 LA 679), a "newsman" who was subpoenaed to appear before the Un-American Activities Committee of the House, refused to answer any questions as to whether or not he was a member of the Communist Party or belonged to so-called Communist or Communist Front organizations. He had signed an employer's application form in the negative to the inquiry as to whether he had ever been a member of the Communist Party or any Communist Front organizations, the German-American Bund, or other organizations listed by the Attorney General of the United States as being subversive.

The arbitrator cautioned that no adverse inference could be drawn from a refusal to testify in reliance upon the privilege against self-incrimination, a Constitutional right. He noted that in this case, as contrasted to the *Los Angeles Daily News* case, the discharged employee testified under oath that he would answer inquiries on the subject and did so when he negatively answered the question concerning Communism on the application which he made in good faith.

However, the arbitrator stated the belief that an employee had no right to work for an employer whose business could be injured by the exercise of his Constitutional right. He expressed the opinion that there would be just and sufficient cause to discharge the employee upon his having testified as he did before the House Un-American Activities Committee. He stressed the need for the news service to give straight and unbiased news, and for its customers to believe that it was such. He felt that for a news reporter to take a determined side of a highly controversial question as this employee did, even though it might be correct, indicated to the public in general and to the employer's customers that his writing might be slanted by his strong views; that even though their belief might not be the fact, the United Press would have just and sufficient cause to discharge him.

Nonetheless, the arbitrator ruled that the ground on which the employee was discharged was his having intended to create a doubt

as to the honesty of his answer to the application question. He found there was no proof to support the subjective intent, and that since he had no right to do so, he could make no finding on the grounds proved at the hearing. He awarded that the cause for the discharge assigned by the employer did not constitute just and sufficient cause under the collective bargaining agreement between the parties.

Concluding Comments

The common threads that appear to be weaved into the cases in which discharges have been sustained might be summed up as the existence of adverse publicity, a failure to secure a retraction or to make a denial, at least at the arbitration hearing as a last opportunity, and in some cases employee unrest and disruption. In the *United Press* case, because of the nature of its services, the adverse publicity standing alone was deemed to be sufficient, a sworn denial to the contrary being considered immaterial because of the damage done by the unfavorable publicity in and of itself.

The reasoning in support of the arbitrators' conclusions in the main has been the necessity of the Company to take its action as a matter of self-preservation. Other than in cases of actual adverse employee reaction, the need is premised upon the potential risk of economic reverses or disadvantage. Preservation of an employer's business as an element in resolving questions of discharge is also basic in the run-of-the mill cases of dismissal. It exists, whether expressed or implied, in terminations for poor work, insubordination, continuous lateness and absence, interference with the work of others, holding back production, disorderly conduct on the premises, and a long list of other types of conduct, all of these stemming from the need to maintain discipline in order to operate economically and competitively, and to permit the attainment of the profit objective. But in these latter instances, there is usually tangible or observable factual information presented from which conclusions can be drawn. But how far does an employer have to go in these so-called security discharges to prove his case? Obviously, in these cases self preservation has not been limited in its context to the individual employer, but extended to the grave considerations of the national defense.

Two most recent cases illustrate somewhat different approaches to a phase of this problem as used by adjudicators of employee discharges. In the matter of *J. H. Day Company Inc., and United Electrical, Radio and Machine Workers of America, Amalgamated Local 766 (Ind.), (June 7, 1954—22 LA 751)*, the employee had

refused to testify before the United States House of Representatives Committee on Un-American Activities on the grounds of the Fifth Amendment. This was reported in the newspapers. The business of the employer did not include dealing with the public nor did it currently have any government contract work which required employee security clearances. There was not evidence of employee antagonism.

During the course of the hearing, questions were asked of the company witness with regard to the effect of the publicity on its business, public relations, financial loss, the obtaining of war contracts or discouragement of persons seeking employment with the company. The arbitrator found that on the basis of this testimony with regard to damage to the Company, there was no distinction in any way between damage due to its association with the United Electrical Workers and the damage due to the activity of this employee outside of the plant. He decided that the testimony was inadequate to sustain *the burden resting on the Company of showing damages.* He pointed out that no single customer was named or that those who were met at business meetings talked about the situation and that financial damage was disclaimed. It was found that there was totally absent any evidence that there was any relation between this employee and the failure of the company to receive any government contracts. He concluded that this discharge was without just cause.

In the matter of the *United Electrical, Radio and Machine Workers of America, et. al. v. General Electric Company* (*December 30, 1954, 35 LRRM 2285*), the union instituted an action before the United States District Court, District of Columbia, for a declaratory judgment, injunctive relief and damages based upon a claim that an employee was discharged improperly on the grounds of the Company's "Policy concerning Admitted Communists, Saboteurs and Subversives; and Employees who Invoke the Fifth Amendment in Order to Refuse to Testify on such Subject," and which action was brought under Section 301 of the Labor-Management Relations Act, 1947. The Court while denying the relief sought by the Union went further and made findings on what was "obvious cause" for dismissal.

The company had issued its policy in December, 1953. It provided for discharge of admitted Communists and Saboteurs. Any employee who had been identified as a Communist by testimony under oath at a public hearing of a congressional committee or other governmental authority, and who thereafter declined to accept an opportunity to testify under oath before such Committee, or had invoked the Fifth Amendment in refusing to testify concerning affiliation with

Communists, espionage or sabotage, were to be suspended for a period of 90 days without loss of pay. The employee could be reinstated if within that 90 day suspension, he appeared before the Committee or authority and fully answered the questions under oath asked of him concerning Communist affiliation, espionage or sabotage and in the course of which he did not admit being a Communist or being engaged in such espionage or sabotage. The employee as an alternative could obtain from the accredited security agency of the United States to the company, a certificate or statement that an investigation of the employee had been conducted and no evidence found to indicate that he was a Communist or otherwise a risk for employment in industries essential to national defense. In the event that the employee did not become entitled to reinstatement within those 90 days, he was to be discharged. The employee in question in this case had failed to clear himself within the 90 days and was discharged.

Under the contract between the parties with respect to disciplinary discharges, an employee was entitled to a warning notice and then to notification one week in advance of any penalty discharge, ". . . except for discharge for obvious causes. . . ." The Court held that this exception also excluded review by an arbitrator of discharges for "obvious cause." It was its opinion that the company had restricted its right to discharge but had reserved the right to discharge immediately for obvious cause.

During the course of the trial there was testimony that the defendant was criticized by its stockholders and customers after its employees had relied upon the Fifth Amendment before Congressional Committees, and that there had been unrest among fellow employees and in one instance a refusal to work on the same job with an employee who refused to testify regarding his Communist affiliations. The Court concluded that:

> "the threatened loss of good will, displeasure of stockholders and prospective customers, disruption of plant morale and the grave doubts as to the security of employees and its plants, all resulting from the refusal of this employee to testify before Congressional Committees, justified defendant in immediately discharging such employee for obvious cause."

It can be seen from a review of all of these exemplar cases that the decision of an arbitrator in these situations is not easily reached. There are a great many facets that have not been explored for lack of time. But there is sufficient food for thought which should provoke comment on permutations of this delicate problem.

PATENT ARBITRATION: A MODEST PROPOSAL

Albert S. Davis, Jr.

> *"Our wrangling lawyers . . . are so litigious and busy here on earth, that I think they will plead their clients' causes hereafter—some of them in Hell."*
>
> R. BURTON, The Anatomy of Melancholy, Democritus to the Reader.

In many ways, the patent profession has fallen upon melancholy days. By way of illustration:

1. The average cost of prosecuting a patent application to final allowance, without interferences or appeals, is beyond the reach of the average independent research worker.

2. Very few small corporations and fewer individuals can afford the out-of-pocket expense of a full-dress interference.

3. Almost no small corporation or individual can afford the out-of-pocket expense of bringing or defending infringement litigation.

4. In both interference and infringement proceedings, the loss of executives' and technicians' time is serious from the production viewpoint in the individual case.

5. "Calendar delay," trial duration and decisional delay are all very pronounced in interference proceedings and infringement litigation.

6. All protracted, technical, expensive administrative proceedings and trials get a bad press; in the field of patent law they get an unusually bad press.

7. Without quarreling over the reasons, the odds are that any patent which is made the subject of litigation, assertive or defensive, will be found invalid, whether or not infringed.

8. Every one of these factors tends to make patents unpopular, in a judicial, legislative and politico-economic climate which on occasion, to say the least, is not conducive to a strong patent system.

I shall make the further non-violent assumption that most of us

believe that the patent system is of great public and private benefit—that we side with the report of the Bush Committee rather than the Temporary National Economic Committee.

But the patent uniquely is an artificial legal right, a highly artificial one. Partially because it is so artificial, and partially because it is almost the last surviving form of private monopoly, we increase that artificiality. People tend to look at it a little suspiciously, and to make securing and maintaining it a chancy, arduous and ritualistic task. That, however, implicitly repudiates our feeling that the patent system is of great public as well as private benefit. The more we contribute by our acts to making the patent system expensive, dilatory, and a "mystery," in the old trade-guild sense of the word, the more difficult we are making its effective existence.

This relates closely and pragmatically to the proposition of arbitration of patent disputes. Even most opponents of arbitration concede that arbitration as a general rule is rapid, cheap, private, and usually leaves the parties less loathed by each other than is the case with litigation. In the case of patent disputes, it possesses another distinct advantage—it gives the expert tribunal which many have long contended for.

What happens in a typical arbitration before the American Arbitration Association? The International Grommel Corporation decides that Consolidated Gondoleons is infringing its favorite patent. It notifies it so, and suggests arbitration; Gondoleons accepts. The matter is submitted to the Association, and the question framed as simply as this:

> "Does stock model No. 441 grommoleon produced by Consolidated Gondoleons infringe U.S. Patent No. 3,221,594, owned by International Grommel Corporation? Is the said patent valid?"

The submission is further framed as to other defenses, and appropriate contingent relief. The Association sends out a list of prospective arbitrators, which in this instance would include experts in patent law, grommels, gondoleons, and the most nearly related fields of art. Grommel Corporation and Consolidated Gondoleons each strike from this list the names of those either would be unwilling to have serve as arbitrators. Hearings are held shortly before three arbitrators selected from those whose names are left on the list. Their decision follows shortly.

The comparison, in terms of speed, economy, privacy, relative good feeling, and expertness of the tribunal, with the arduous pro-

gress of an infringement proceeding based on like facts is rather obvious. The same comparison obtains in interference proceedings, and to a somewhat lesser extent in contractual breach and interpretation cases.

If it is so obvious, what are the reasons it isn't done more often?

The first, and I daresay the worst one, is that a very few corporations have adopted a firm corporate policy of never arbitrating anything. Nothing can be done here except to bow one's head, and hope that they will learn, and pass on.

The second is the common misconception that arbitration is a form of mediation. It is not, unless the parties want it to be. The arbitrators pick black or white, not an appealing shade of gray.

> "In a proceeding, where the agreement and the prevailing arbitration law contemplate the making of an award, the duty of an arbitrator is not to facilitate a compromise but to reach a fair decision and to make a just award. . . . It is the privilege of the parties voluntarily to effect a settlement of their controversy during an arbitration proceeding and to withdraw the case or ask an arbitrator to give it the status of an award. It is not, however, his privilege to initiate or participate in making such a settlement."[1]

The third ground of opposition to arbitration which one encounters is another fairly frequent one. It may be phrased this way—"There's a lot of law involved in this matter, and I don't think it should be decided on appealing facts rather than legal rights." An arbitrator in some small measure does resemble Thurman Arnold's honest blacksmith sitting under a tree, but the resemblance is principally confined to the lack of a judicial gown. An arbitrator, save in two states, is a judge of both law and fact. If arbitration has any effect on the legal stuff attending all contested issues of fact, it is that it either tends to get down to the fundamental propositions of law involved or that, when a relatively intricate or legalistic one is concerned, the reason for the rule is considered. Most rules of law have the common sense of pragmatic experience behind them—we exclude hearsay evidence, for instance, because it is unreliable and cannot be adequately checked for truth. I suggest that if a rule of law is not based on common sense, it is not entitled to genuflection before that day certain when the courts cut it down, and that you should neither wish to rest your case upon it nor do so, either as a matter of pragmatics or morals.

1. Kellor, Arbitration in Action 31, 33 (1941).

A variant on this objection is the fact that (save for two states), there is, in the absence of fraud, favor or departure from the terms of the submission, no effective judicial appeal from an arbitration award, a fact which leads some practitioners to feel that a case isn't looked at enough when it is arbitrated, or that there is no chance to correct error. Considering the tremendous number of new entrants into arbitration every year, the general feeling at least among many clients is that they are willing to run the chance of a judicial error, as it were, in the trial court if they can have the advantages which go with arbitration.[2]

A fifth objection is not usually raised entirely frankly. It begins by suggesting that in an arbitration the arbitrators might not perhaps pay as much attention to counsel as a judge would; it slides off from that into restatement that the client will not have the value of counsel's appellate skills; and what it really means is that some lawyers are afraid that there might be less business for them in the milieu of arbitration. This is a fear without foundation. It is only a formal answer to say that the Association rules provide for representation by counsel, and that the Association realizes that arbitration must be made attractive to lawyers if it is to be widely used.[3] Three things are needed in an arbitration, above anything else--1) the ability to prove facts by the production of persuasive evidence; 2) the ability to narrow a dispute down to the one or two central issues on which it should turn; 3) the ability to persuade as to these issues, from these facts, by logical reasoning. These abilities are the skill of the trial lawyer, the skill of the experienced briefer, and the skill of the advocate.[4]

Finally comes one objection to arbitration with which one can have little patience: "Yes, but arbitration is not suited to the particular kind of subject-matter which is involved here." This usually breaks down into two heads—(a) it is risky as a matter of public policy to arbitrate this kind of matter, because it looks as if there were something to hide; and (b) it is not at all clear that we have the right to arbitrate this kind of dispute, and our jurisprudential

2. Nothing suggests that statistically the appellate treatment of patent stuff is more sympathetic than the trial treatment.
3. Kellor, *supra* n. 1 (particularly including the footnoted excerpt from *Matter of Kayser* (*Skulnik*) at 110) 37, 89; Gotshal, S., *The Lawyer's Function in Arbitration,* 8 Arb. J. (NS) 23 (1953) and authorities there cited; Robb, The Arbitration of Patent Controversies, XXV J.P.O.S. 412 (1943); Robb, Arbitration Procedure Compared with Court Litigation in Patent Controversies, 17 Law & Contemp. Probs. 679 (1952).
4. As an amusing (and non-pertinent) sidelight, contrast Chapter VII, esp. pp. 140-141, and Chapter XIV of Stryker, The Art of Advocacy (1954).

system is apt to punish us, even if inadvertently, for doing so.

If privacy in itself is bad, then it is a very serious mark against arbitration generally, because arbitration prides itself on the fact that it is private. The important thing is that it is private, not secret.

There is a certain climate of political economics which is not entirely convinced that there should be a patent system. If you argue with its exponents, and beat them back a bit, you will be met with the contention that there ought to be a patent system, perhaps, but that compulsory licensing should be required. If you beat them back from that, then you come to the argument that patents are monopolies and useful tools of other forms of monopoly, and that accordingly the least that can be done is to require that every use of them, above all any attempt to enforce them, should take place in a shower-bath of inspection lit by a flood-light of publicity.[5] Actually, there is no form of property, save possibly the marriage contract, which cannot be made the subject of manipulation or amassment to the point of monopoly. On occasion we encounter someone who is unhappy about patents and unhappy about arbitration too, and thinks it unconscionable that they should be brought together.[6] The fact that patents have been or can be used to assist in the violation of the laws is no more condemnatory of them as such, and therefore no more a demonstration that arbitration (because of privacy) should not be used with them, than is the case with any other form of property.

The second facet of the argument, that arbitration is not suited to patent matters for jurisprudential reasons, is valid only insofar as settled law supports that view. What is the status there?[7]

---

5. Abramson, The Economic Bases of Patent Reform, 13 Law and Contemp. Probs. 339 (1948) is a thoughtful approach to this view.
6. Kronstein, Business Arbitration—Instrument of Private Government, 54 Yale L.J. 36 (1944).
7. See generally Federico, Arbitration of Early Patent Disputes, 2 Arb. J. 9 (1938); Deller, The Use of Arbitration in Patent Controversies, 2 Arb. J. 399 (1938); 21 J.P.O.S. 209 (1939); Deller, Specific Enforcement of Agreements to Arbitrate Patent Questions, 17 N.Y.U. L.Q. Rev. 603 (1940); O'Brien, The Enforcement of Arbitration Agreements in Infringement Disputes, 22 J.P.O.S. 289 (1940); Robb, *supra* n. 3; Sturges and Murphy, Some Confusing Matters Relating to Arbitration under the United States Arbitration Act, 17 Law & Contemp. Probs. 580, 597 (1952); Kochery, The Enforcement of Arbitration Agreements in the Federal Courts, 39 Cornell L. Q. 74 (1953); Ellis, Patent Assignments and Licenses, *passim* (2d ed. 1948); Deller, Extent and Usefulness of Arbitration in Settling Patent Disputes, 3 Arb. J. (N.S.) 100 (1948). Not enough attention has been given to *Galion Iron Works & Mfg. Co. v. J. D. Adams Mfg. Co.*, 128 Fed. (2d) 411 (C.C.A. 2d, 1942). See *Campbell v. Automatic Die Products Co.*, 104 U.S. P.Q. 77 at 79-80 (Ohio Sup. Ct., December 15, 1954).

The most difficult areas of patent disputes at the present time, from the layman's point of view which will always be concerned with cost, speed and expertness, are:

INTERFERENCES. Curiously enough, under the old practice, the arbitration of interferences was an accepted form of procedure.[8] We may conveniently class with this disputes which are only in form interferences, such as those relating to originality and inventorship as between contesting applicants. In the absence of fraud, the difficulty here is not the effect of the arbitration award as between the contestants, but the effect as against third parties following issuance of a patent. Judgment on the award in an arbitration would not be court-entered, of course, but the interference would be terminated, as would any other interference, by written disclaimer, concession of priority, or abandonment.[9] Should the action taken upon the arbitration award be mistaken, i.e., should the award be erroneous, the courts would not recognize the patent as necessarily valid, nor give it the benefit of the somewhat nominal presumption of validity on issuance.[10] But precisely the same argument applies to *any* settlement of an interference, and the conclusion that all disputed but non-inimical interferences must be pressed to a litigated ending is a drily logical extreme. If parties to an interference are in a non-litigious *and* conciliatory mood, concessions of fact where possible, short affidavits where not possible, and a submission, or the appropriate technical practice to terminate the interference (e.g., failure of a losing junior party to offer evidence) will take care of the situation. Where, however, the parties are in a non-litigious but non-conciliatory mood, it may be suggested that arbitration is an acceptable alternative to save both time and technicality.

Unfortunately, most of the attention devoted to the use of arbitration in patent matters has been lavished on the problem of whether the Federal Courts can enforce an arbitration agreement directed to such matters, whether they will stay an action or proceeding pending an arbitration, and whether they will enter judgment on an award. In a measure, that is beside the point in a modest proposal. Not to pass the problem, it arises from the fact that the Federal Arbitration Law[11] commences with a statement that seems

8. Federico, *supra* n. 7.
9. Rule 262. Any writer on this subject-matter must confess indebtedness to A. W. Deller, and in other respects to Dean Wesley Sturges and I. O. Murphy, *supra*, n. 7.
10. See the discussion of the cases in Deller, Extent and Usefulness of Arbitration in Settling Patent Disputes, *supra* n. 7.
11. 9 U.S.C. 2, 3, 4.

to limit its scope to maritime transactions and contracts relating to transactions in commerce, with respect to validity, irrevocability and enforceability of intracontractual agreements to arbitrate. Only litigation eventually produced a conclusion that the next section of the statute, permitting a stay of an action where there was an agreement for arbitration, was not so limited.[12] There has been no judicial agreement as to whether the following section of the statute, permitting a petition to enforce an arbitration agreement in the District Courts, is so limited. The two decisions bearing on the direct point, both in trial court,[13] have been vigorously debated, and the tenor of cases in higher courts dealing with different subject-matter but the same problem of jurisdiction is mixed.[14] It cannot be said that a thorough judicial exploration has been made of the possibilities of the Federal statute. It appears to be quite clearly settled that an accomplished submission to a state court will be approved as to jurisdiction.[15]

INFRINGEMENT CASES. The dispute over Federal statutory jurisdiction, and its extent, has been as pronounced here as elsewhere. Again, it is in large measure beside the point, for the very simple reason that if you are willing to submit to arbitration, you should be willing to submit to the results of arbitration, if needs be without the entry of a formal award. The only remaining substantial question at the end of an arbitration is really whether the arbitrators were honest. There is no point in entering arbitration in a hostile and litigious mood, so far as the arbitration itself is concerned. Turning the point about, and looking at arbitration clearly compulsory, but resented by one of the parties because it prefers litigation, a favorable aspect is that, as said, it does much to dissipate ill-feeling because of its very nature.[16]

---

12. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 293 U.S. 449 (1935).
13. *Zip Mfg. Co. v. Pep Mfg. Co.*, 44 Fed. (2d) 184 (D.C.D. Del. 1930); *In re Cold Metal Process Co.*, 9 Fed. Supp. 992 (D.C.W.D. Pa. 1935).
14. See Sturges, W. A. and Murphy, I. O., and Kochery, D. R., *op. cit. supra* note 7.
15. *Cavicchi v. Mohawk Manufacturing Co., Inc.*, 256 App. Div. 1069, 12 N.Y.S. 2d 360 (1st Dept. 1939-memo.); aff'd 281 N.Y. 629, 22 N.E. 2d 179; rearg. den. 281 N.Y. 669, 22 N.E. 2d 763 (1939-memos.); dism. for want of substantial Federal question, 308 U.S. 522, 60 S. Ct. 294, 84 L. Ed. 442 (*per cur.* 1939); rearg. den. 308 U.S. 639, 60 St. Ct. 382, 84 L. Ed. 531 (1940-memo.). This is not dispositive of questions of res adjudicata, however. See 34 F. Supp. 852 (D.C.S.D.N.Y. 1940); Note, 8 U. of Chi. L. Rev. 530 (1941).
16. On the practical level of acceptability, the wholly favorable view of as doughty a fighter as John Robb is about the highest recommendation which could be had. See Robb, The Arbitration of Patent Controversies 25 J.P.O.S. 413, at 422-23 (1943).

CONTRACTUAL QUESTIONS. On this it would seem quite clear that there is no longer any state jurisdictional question, and that the Federal jurisdictional question is unresolved.[17] The logic of the use of arbitration here is well-nigh inescapable, and the "public policy" arguments made against it[18] seem to be losing ground. The use of arbitration as a means of reference for "fairness of terms," for instance, was accepted by the Anti-Trust Division after considerable thought in the cortisone licensing situation. There, in arranging for the licensing and sub-licensing of the manufacture of cortisone under five separately-owned groups of patents, a question arose as to what would be reasonable terms for necessary cross-licenses from persons seeking manufacturing licenses under all the patents, who might themselves possess patents which would block others in a most economic synthesis. Under the agreement for licensing and sub-licensing, the question of whether cross-license terms are "reasonable" will, on demand, be referred for arbitration by the Association.[19] We now find that acceptance of this procedure is on the increase,[20] and has been approved in principle by the Supreme Court.[21]

Unlike Swift's satire, this modest proposal does not call on anyone to devour their own young for the sake of logic. It is simply this—that members of the patent bar should give serious thought to the use of arbitration as an expert, rapid, economical and not unfriendly way of settling as many disputes as possible which arise in their practice. Much remains to be done. There is legal underbrush which should be cleared away on the proper construction of the Federal Arbitration Act. It may be that a determined appeal will do it; it may be that an amendment to the Act will be necessary. It is, however, quite plain that the use of arbitration in such matters is neither as odd a remedy as a bill to review, nor as theoretical a one as an action for libel on a patent.[22] Quite without resolving action, however, there is a wide and useful field here for arbitration at the present time.

---

17. In addition to the authorities cited above, see the language of *American Locomotive Company v. Chemical Research Corporation*, 80 U.S.P.Q. 63 (C.A. 6, 1948); and the policy statement of *Besser Mfg. Co. v. United States*, 93 U.S.P.Q. 321, at 322-23 (S. Ct. 1952).
18. Deller, *supra* n. 7.
19. Davis, Cortisone—A New Drug Meets an Old Remedy, 6 Arb. J. (N.S.) 4 (1951).
20. e.g., as to "reasonable royalties"; see *Note*, 7 Arb. J. (N.S.) 44 (1952).
21. *Besser Mfg. Co. v. United States*, *supra* n. 17.
22. A subject which would bear serious investigation.

ENFORCEMENT OF AMERICAN AWARDS IN NORWAY

Robert Goldscheider

The question of the enforceability of American arbitration awards cannot be answered as definitively when one is dealing with Norway as it can in connection with many European and Latin American countries. There is no statute governing the matter,[1] nor has the United States concluded any treaty with Norway covering arbitration agreements and their enforcement as has been done in several instances.[2] Furthermore, the United States was not a party to the Geneva Convention of 1927. The Norwegian courts have not discriminated per se between nations which did or did not participate in the 1923 Agreement in determining the validity of a foreign arbitration clause and a subsequent proceeding under it as the Italian tribunals did, although Norway ratified this earlier Convention. Since Norway failed to participate in the 1927 Agreement dealing with enforceability, this has no relevance to the question being considered. And so, one is obliged to look to the cases in order to formulate a Norwegian rule.

The holder of a foreign award seeking enforcement must institute formal suit in a Norwegian court of general civil jurisdiction. The court will re-examine the award in its procedural aspects. Broadly speaking, however, if the decision of the foreign arbitrators is found to be formally unassailable at the place of its rendition, it will be binding and will be enforced in Norway.

The court in Norway will try to ascertain (1) if the arbitral award pleaded really exists; (2) if the basis of the award is a valid arbitral agreement; (3) if the procedure under which the hearing

1. See Lorenzen, Foreign Awards, 45 Yale L. J. 39, (1935), reprinted in Selected Articles on the Conflict of Laws 506, 514 (1947); Domke, On the Enforcement Abroad of American Arbitration Awards, 17 Law and Contemporary Problems 545 (1952).
2. To date, treaties have been concluded with Denmark, Germany, Greece, Ireland, Israel, Italy and Japan.

was held conforms to Norwegian standards of judicial fairness; and (4) if the conflict was of such a nature that it could be a subject of arbitration in Norway.[3]

The first point would not generally cause difficulty, especially if the parties should avail themselves of the machinery of such a recognized organization as the American Arbitration Association, in that there would be regular records of the proceeding, copies of which could be presented to the court. However, a notarized copy of the award at the place where it was made should also be sufficient to satisfy this formality.

With regard to the question of whether or not the basis of the award is a valid agreement, the Norwegian courts have adopted a very liberal attitude. The rule seems to be clear that the interpretation of the agreement made at the place of the proceeding will be respected, or at least given great weight. This view can be seen in a case involving a Norwegian seller and a British buyer in which the former claimed he was prevented from making delivery as a result of force majeure.[4] The seller contended that non-delivery was not an arbitrable issue since the contract's arbitration clause, on its face, said that it covered only the things mentioned "under the stipulations of this contract." There was no reference to non-delivery in the contract and so the lower Norwegian court found for the seller. Upon the affidavits of several British Chambers of Commerce, and also the Swedish Chamber of Commerce which appeared as an amicus curiae, who stated that it was their general practice to include non-delivery within this arbitration clause, the Norwegian Supreme Court reversed, acknowledging the weight they must give to the views of the British authorities in this contract which specified that the arbitration hearing was to be held in England. The Court took this stand despite the fact that an affidavit was submitted by the Norwegian Lumber Association declaring it to be their policy to read such a clause in accordance with the view taken by the lower court. It thus appears safe to say that a contract arbitration award, valid at the place of its rendition, will be respected when brought over to Norway.

The third criterion mentioned above, concerning the presence of elements of fairness in the arbitration hearing, has been litigated in the Supreme Court in two interesting cases. In the earlier,[5] an

3. See Eckhoff, *Rettskraft*, Oslo (1945), p. 378.
4. Rt. 1922, p. 635.
5. Rt. 1913, p. 114.

English buyer of wood pulp refused to accept a shipment from a Norwegian seller because of purported quality defects. The contract contained an arbitration clause under which each party was to appoint an arbitrator. The seller's appointee demanded that the hearing should be held in Norway, thereby acting in accordance with the express orders of the seller. The arbitrator appointed by the buyer did not consent to this and rendered an award in favor of the buyer all by himself, sitting in England. In the subsequent action for enforcement in Norway, it was found that, although no express stipulation was made to that effect, the parties probably contemplated that the arbitration proceedings should be conducted in England, and the award was upheld. In that the contract was interpreted this way by the Court, it went on to declare that the appointment by the seller amounted to no appointment at all. Since the proceedings in England conformed in every other way to the recognized British rules of procedure and there was adequate notice, no objection could be made to the enforcement of the award. However, five years later[6] it was held, three judges out of seven dissenting, that where a Norwegian seller, despite several invitations from a buyer in Teneriffe, Canary Islands, did not appoint an arbitrator at the place of delivery in accordance with the contract, the subsequent action of the buyer did not bring about an enforceable arbitration proceeding. The agreement stated that each party should appoint one arbitrator but, when the seller failed to act, the buyer, without further notice to the seller, had the goods examined by two men appointed by him. These men declared before a notary public that the goods were at variance with those specified in the contract and expressed an opinion about the difference in value. The buyer's subsequent claim for compensation in Norway based upon this estimate was dismissed. The judge writing for the majority mentions that an English brokerage house, which could not possibly have any connection with either party, had stated that the goods, which were of a non-perishable nature, conformed materially with the contract specifications at the time of shipment. He continued by saying that the qualifications and relationship of the "arbitrators" to the buyer were unknown, that elements of judicial safeguards, such as adequate notice, were lacking and that the proceedings were just too informal to warrant enforcement in Norway. It is significant to note that three of the members of the Court were willing to enforce even this award. The writer of the dissenting opinion admitted that the desired for-

6. Rt. 1918, p. 337.

malities of an arbitration hearing were lacking but felt that the buyer acted under necessity because of the exigencies of the situation. They continued by saying that the Norwegian seller, in contradicting the buyer's assertion that his action was in accordance with Spanish law, must assume the burden of proof. This point was not discussed by the majority since their position made it unnecessary for them to reach it. Since a very informal "hearing" such as this barely failed to gain approval of a majority of the Supreme Court, it seems clear that a dispute settled under the auspices of a recognized organization like the American Arbitration Association, would face no objection on grounds of judicial fairness.[7] Furthermore, careful drafting, making provisions for the place of hearing and the action to be taken in the event that one of the parties defaults in the appointment of an arbitrator, would seem to dispose of the remainder of the problem.

The final consideration mentioned above, whether the dispute was of such a nature as to be a proper subject for arbitration in Norway, would not pose a serious obstacle to enforcement. The scope of controversies which may be submitted to arbitration is very wide in that this means of settling disputes has been generally accepted here and in other parts of Scandinavia since the turn of the century. Thus, this fourth criterion would also seem to be governed by the generalization that an award will be enforced if valid at the place of rendition.

Aside from a review of the procedure and formalities of the foreign award, the Norwegian courts have clearly stated that they will not re-examine its substantive aspects. In the earliest known opinion on arbitration, the writer for the Supreme Court said:

> "Consequently I reach the same conclusion as the lower court that no objection can be made against the giving of the arbitral award. And, when this is the case, no attack may be launched against the subject matter of the award, even if such substantive aspects may be incorrect, because the award is just as binding as a final judgment."[8]

Succeeding opinions seem to have followed this principle, though tacitly, in that it is not even raised as an issue in some. Where the Court does scrutinize the subject matter, it is only to determine

7. For a model set of rules printed in English which are closely similar to the domestic Norwegian Rules of Arbitration, and which are completely acceptable to the Norwegian judicial authorities, see the Copenhagen Rules adopted by the International Law Association, 44th Report, I.L.A., Copenhagen (1950) p. 271. Information obtained in an interview with Judge Sverre Daehli of the Norwegian Supreme Court, Nov. 10, 1954.
8. Rt. 1897, p. 289.

whether the arbitrator violated his duty of fairness to the parties and, aside from the hint of this one may read into the opinion in the Canary Islands case, such a finding has never been made.

In sum, it must be stated that there are only five cases in the reports covering this question of enforcement of arbitration awards in Norwegian courts since 1897, none of them concerned with disputes between American and Norwegian parties. The very paucity of authority testifies to the fact that foreigners need very rarely resort to the courts in order to satisfy a remedy accorded them in arbitration outside Norway. In foreign commerce, where it is desirable to maintain contacts, it is most expedient to respect the arbitrators' findings and the Norwegian business community seems to have recognized this fact. The courts, too, have apparently realized that they would create serious obstacles to international trade if they should raise a shield which might permit Norwegian traders to escape contract responsibility. They have therefore consistently followed a policy designed to foster the prompt enforcement of foreign awards.[9]

9. The Norwegian Ministry of Justice and Policy, in a letter to the Ministry of Foreign Affairs, dated Nov. 18, 1953, (Jnr. 15259-II 53) described the effect of a Swedish arbitral award in Norway as follows: "On the occasion of the questions which are set up by the Swedish Embassy in note of October 9th 1953 the Ministry of Justice and Policy shall declare: *To point 1.* A Swedish arbitral award will not directly be valid in Norway. Norway is not a party to the convention of September 26th 1927 concerning recognition and enforcement of arbitral awards; *To point 2.* In order to have an arbitral award, which is rendered in Sweden, enforceable in Norway, suit must be instituted for a Norwegian court to get an enforceable decree. If the Swedish arbitral award is rendered in accordance with one for the parties binding arbitral agreement, the Swedish award will form the basis for the decision of the Norwegian court; *To point 3.* As Norway is a party to the protocol of September 24th 1923 concerning arbitral agreements, it will, if the other party objects, not be admissable for the Swedish party to institute proceedings for a Norwegian court instead of making use of the arbitral agreement, see the protocol point 4."

READINGS IN ARBITRATION

RECENT BOOKS AND PAMPHLETS

The American Lawyer. A Summary of The Survey of the Legal Profession. By Albert P. Blaustein and Charles O. Porter. Arbitration: p. 34, 54, 123-125. University of Chicago Press. Chicago. 360 p. $5.50.

Arbitration of Labor-Management Grievances. Bethlehem Steel Company and United Steelworkers of America 1942-52. Bulletin No. 1159, U.S. Department of Labor. 42 p.

Creative Time Study and Methods. Proceedings of the Ninth Annual Time Study and Methods Conference of the Society for Advancement of Management and the American Society of Mechanical Engineers, New York 1954. 159 p. Arbitration: 154-159, by Dennis J. Comey.

Current Problems in Labor Relations and Arbitration. Digest of Proceedings of Cornell Conference, April 13 and 14, 1954. New York State School of Industrial and Labor Relations, Cornell University. 62 p.

The Impact of Strikes. Their Economic and Social Costs. By Neil W. Chamberlain and Jane Metzger Schilling. Yale Labor and Management Center Series. Harper & Brothers, New York. 257 p. $4.00.

Municipal Labour Relations in Canada. By S. J. Frankel and R. C. Pratt. Chapter IV: Arbitration. Montreal, Quebec. 87 p.

Preparing and Presenting Arbitration Cases. Selected Addresses from the 1954 Conference on Arbitration & Labor Relations. University of California at Berkeley. 36 p.

Proceedings of the Session on Arbitration at the State University of Iowa. College of Commerce, State University of Iowa, Iowa City. 93 p.

Arbitration as an Industrial Relations Technique: *The Bethlehem Experience.* By Charles C. Killingsworth. Reprint from Proceedings of the Sixth Annual Meeting, Industrial Relations Research Association (1954) 1-12.

Foreign Exchange in the Postwar World. By Raymond F. Mikesell. The author points out that exchange regulations of many countries, in their harmful effects on the free flow of goods and services, must give way to a system of international coordination by which convertibility of currencies may be achieved. New York: Twentieth Century Fund, 1954, 658 p. $5.00.

ARTICLES AND NOTES IN LEGAL PERIODICALS

When is a Dispute Arbitrable—Jurisdiction of Court and Arbitrator. (Essenson v. Upper Queens Medical Group, 307 N.Y. 68). 23 Fordham Law Review (1954) 352-356.

Commercial Arbitration and the Utah Arbitration Act. By Alfred C. Emery. 4 Utah Law Review (1954) 174-197.

The Use of Tripartite Boards in Labor, Commercial, and International Arbitration. Note, 68 Harvard Law Review (December 1954) 293-339.

The Legal Status and Suability of Labor Organizations. By Morris D. Forkosch. 28 Temple Law Quarterly (1954) 1-30.

Arbitration Policies, Functions, and Procedures of the Federal Mediation and Conciliation Service (Official Text issued Nov. 30, 1954). Special Report of the Bureau of National Affairs, Washington, D. C.

Compulsory Arbitration in Indiana. By A. R. Porter, Jr. 5 Labor Law Journal (1954) 774-778, 791.

The Challenge of Arbitration to the Practicing Attorney. By Charles Jules Rose. 21 Journal of the Bar Association of the District of Columbia (1954) 286-289; 29 Los Angeles Bar Bulletin (1954) 335-340.

The Courts and Arbitration: *An Aspect of "Obedience to the Unenforcible,"* By Samuel H. Hofstadter. New York Law Journal, November 8, 9 and 10, 1954; reprinted in 9 Arb. J. (1954) p. 179. Cp. also Judge Hofstadter's letter to the Editor of The New York Times, November 25, 1954, and comment by Edward B. Schulkind, *ibid.* December 9, 1954.

Labor Law—Specific Performance of Arbitration Agreement Granted Under § 301(a) Taft-Hartley Act (Textile Workers Union of America v. American Thread Co., 113 F. Supp. 137). 3 Buffalo Law Review (Winter, 1953) 154-156.

The Role of Law in Labor Disputes. By Archibald Cox. 39 Cornell Law Quarterly (1954) 592-610; reprinted in 77 Monthly Labor Review 1113-1117.

Worker's Rights in Arbitration Pacts Discussed, 77 New Jersey Law Journal 166 (May 13, 1954).

The American Legal System. By Lewis Mayers. This descriptive treatment of the administration of justice in the United States traces the development of the legal institutions in their various aspects. The author, a Professor of Law at City College of New York, devotes a chapter to "Voluntary Arbitration Tribunals and Their Control by the Courts" (p. 543), discussing, among other topics, court proceedings in aid of arbitration, and presenting a survey of the growth of commercial and labor arbitration in the ever-changing American legal system. New York: Harper, 1955, 589 p. $6.50.

Labor Law. Development—Administration—Cases. By Sidney C. Safrin and Robert C. Sedgwick. This book, designed for college courses, gives a careful selection of court decisions and administrative rulings on labor law. Chapter X, Mediation and Arbitration, includes sample awards and a survey of some community approaches to industrial relations. New York: Thomas Y. Crowell Co., 1954, 590 p. $3.95.

Railroad Wages and Labor Relations 1900-1952. A Historical Survey and Summary of Results. By Harry E. Jones. The Chairman of the Eastern Committee for the National Railroad Adjustment Board offers valuable statistical data, especially on the so-called "Arbitration Act" of 1888. New York: Bureau of Information of the Eastern Railways, 1953, 375 p.

FOREIGN ARBITRATION PUBLICATIONS

(Titles translated for convenience of reader)

Danger to Arbitration: The Alleged Lack of Authority of Arbitrators in Case of Contest of the Existence or Validity of an Arbitration Clause, 28 Juris Classeur Periodique 1194 (October 20, 1954), considers numerous decisions of French courts on the subject matter and presents interesting viewpoints for the solution of that vexing question.

Arbitration Tribunals in America. By Dr. Georg Weisl. 7 Oesterreichische Juristen Zeitung (1952) 285-287.

Laws of Arbitration. By Dr. J. Sussman, a publication of Sifrya Mishpotit (Legal Library), Tel-Aviv, Israel, 1953.

Arbitration in the Americas of International Disputes under Treaty Provisions. By Vicente Sanchez Gavito, 4 El Foro (Organo de la Barra Mexicana (1954) 5.

Conciliation and Arbitration in Industrial Disputes. By I. R. W. Alexander, President, Institute of Arbitrators. The Chartered Institute of Secretaries, London, England.

An Analytical Theory of Labour Arbitration in Australia. By Mark Perlman. 1 Sydney Law Review (1954) 206-214.

International Arbitration. By Charles Carabiber, an address delivered by the well-known Paris lawyer at a meeting of the French Committee on Private International Law (Paris, Sirey, 1955, 23 p.).

The Independent Validity of Arbitration Clauses. By R. Powell, in Current Legal Problems 1954 (p. 75-93), the publication of the Faculty of Law, University College, London, England.

Treaties on Commercial Arbitration—A Test of International Private Law Legislation. By Arthur Nussbaum, Archiv des Voelkerrechts (Tuebingen) vol. 4 (1954) p. 385-407, a revision in the German language of the article in 56 Harvard Law Review (1942) 219.

Labor Law in Quebec. By Emile Bouvier, of the Institut Social Populaire, Montreal (Dec. 1954, no. 475), a well-documented survey of labor law.

On Contractual Arbitration in the American Collective Bargaining Agreement, and *On the Function of the Arbitrator in the American Collective Bargaining Agreement.* By Dr. Lukas F. Burckhardt, Gesetz und Recht, Basle, Switzerland, vol. 6 nos. 1 and 4 (1954).

A Survey of the Law of Arbitration. By I. H. Luxford. The Accountants' Journal, New Zealand Society of Accountants, vol. 31 (1953) p. 362-379.

The Arbitration Chambers and Commercial Arbitration. By Gaston Grech. This French volume describes the activities of arbitration committees of chambers of commerce in France and gives references to court decisions dealing with arbitral issues. Paris: Librairie Generale, 1952, 167 p. $1.50.

Arbitration Agreement and Arbitration Proceedings. By Drs. Balser and Boegner. A brief presentation of the prevailing German law and practice of commercial arbitration, containing numerous forms used in arbitration proceedings and the arbitration rules of various arbitration committees of chambers of commerce and commodity exchanges. Frankfurt on Main: 1954, 124 p. $2.25.

Commercial Arbitration. By D. J. Schottelius. The author is general counsel of the Bremen Cotton Exchange. This comparative survey of the arbitration practice of the Bremen Cotton Exchange and the permanent arbitration tribunals in Bremen and Hamburg, Germany, also deals with the rules of British, Egyptian and American Cotton Exchanges and Cotton Trade Associations. Many instances of arbitration proceedings and questions of arbitration practice are dealt with in the booklet which gives valuable references to further source material. Bremen, Germany: Hauschild, 1953, 205 p. $2.80.

The American Arbitration Association. By Henri Bressac. Bulletin No. 8, Association des Eleves, Institut des Sciences Juridiques et Financieres, Faculte de Droit (Paris, France, October 1953).

On the Shop-law of the Quarry-Workers in Basle, Switzerland. By Lukas F. Burckhardt, 49 Schweiz, Archiv fuer Volkskunde (1953) 132-164.

Obligation of private arbitration tribunals to follow substantive law. By Rolf Dannenbring. 65 Zeitschrift fuer Zivilprozess (Tuebingen, Germany) (1952) 136-146.

The Role of the Independent Chairman. By Sir Lynden Macassey, in The Director, Journal of the Institute of Directors of London, England (October 1953) 55-56.

An Introduction to the Study of Industrial Relations. By J. Henry Richardson. Chap. 24: Conciliation and Arbitration. London: Allen & Unwin (New York: Macmillan) 1954, 442 p. $5.25.

Dictionary of Marketing Terms. United States Usage. A publication of the International Chamber of Commerce, prepared by Richard Webster, 102 pages. (Available from Verlag fuer Recht und Gesellschaft, Basle, Switzerland.)

Conciliation and Arbitration Act 1952 (Commonwealth). By J. K. Chippindall. 2 Sydney Law Review (1954) 222-225.

The Quebec Laws of Conciliation and Arbitration. By Jacques Guilbault, La Revue du Barreau de la Province de Quebec, vol. 11, p. 221, 277, 329, 385, four articles dealing with various phases and aspects of both the law and practice of settlement of labor-management disputes in Quebec.

"Worker," A Monthly Journal About All Categories of Workers, in its fourth year published by Pakistan Labour Publications, regularly includes the full text of industrial arbitration awards which were declared binding on the parties by declaration of the Pakistan Government.

Arbitration Review (Revue de l'Arbitrage) is the new publication of the French Committee of Arbitration, recently established in Paris (see Arb. J. 1953, p. 196). The first issue 1955 contains articles by leading authorities on French arbitration law and practice: Henri Battifol, Charles Carabiber, Jean Robert and Henri Motulsky; and a well-annotated survey of French court decisions and of other jurisdictions such as of New York, Calcutta (India) and Bern (Switzerland). A Review of Periodicals and of Conferences advises of events in the U.S.A., France, Italy and Belgium. This new publication deserves the full attention of all interested in the development of commercial arbitration. Paris, France: Sirey. Quarterly. $2.00.

Commentary to the (German) Civil Code. By J. v. Staudinger and others. This leading commentary, in its eleventh edition, contains complete and reliable references to both case law and the so-called doctrine of German law. An indispensable tool for all who are concerned with the interpretation of statutory law and the practice prevailing in Germany. Parts of Vols. I, II, III and the complete Vol. V have now appeared. Berlin: J. Schweitzer. 1954.

German Court Decisions in the Field of Private International Law in the Years 1950 and 1951. By A. N. Makarov. This volume in the German language contains a collection of source material which will be of great value in questions arising out of the increased trade relations with Germany. The question of enforcement of foreign awards is also included (p. 317). Berlin: Walter de Gruyter, 1954, 400 p. $9.25.

Journal of Aviation Law, a publication of the Research Institute for Aviation Law at the University of Cologne, Germany. Several articles and notes discuss the settlement-of-dispute provisions of multilateral and bilateral agreements on civil aviation; Arnold W. Knauth of New York contributes reports on developments in the U.S.A.

International and Comparative Labor Law Review appears under the direction of Renato Balzarini of Bologna, Italy. The first volume consists of material in various languages on the development of labor law, including articles by Professor Arthur Lenhoff of Buffalo Law School: "The Progress of Labor Law in the United States of America Since 1950" (p. 257-272), and "American Labor Law in 1953" (p. 667-687).

REVIEW OF COURT DECISIONS

THIS review covers decisions in civil, commercial and labor-management cases, arranged under six headings: I. *The Arbitration Clause,* II. *The Arbitrable Issue,* III. *The Enforcement of Arbitration Agreements,* IV. *The Arbitrator,* V. *Arbitration Proceedings,* VI. *The Award.*

I. THE ARBITRATION CLAUSE

ARBITRATION CLAUSE ON BACK OF CONTRACT FORM IS BINDING where it is stated early in the contract that the transaction is "subject to the terms and conditions contained on the back hereof." A stay of arbitration was therefore denied and that order was affirmed. *Mott Gardens v. Prudential Lumber Corp.,* 284 App. Div. 988, 136 N.Y.S. 2d 379 (Second Dept. Nov. 29, 1954).

ARBITRATION CLAUSE IN CHARTER PARTY NOT BINDING WHERE BILL OF LADING FAILED TO IDENTIFY CHARTER BY REFERENCE IN BLANK SPACE SPECIFICALLY PROVIDED FOR SUCH IDENTIFICATION. *Southwestern Sugar and Molasses Co., Inc. v. The Eliza Jane Nicholson,* 126 F. Supp. 666 (S.D. N.Y. Dec. 27, 1954, McGohey, D. J.).

ARBITRATION NOT ENFORCEABLE WHERE ONE PARTY IS GIVEN OPTION AS TO ARBITRATION. Such a clause "lacks the element of mutuality and is hence unenforceable," said the court. *Mechanical Mirror Works, Inc. v. Sloane Estates, Inc.,* N.Y.L.J., Oct. 25, 1954, p. 7, Aurelio, J.

SIGNATURE NOT REQUIRED FOR BINDING ARBITRATION AGREEMENT. Arbitration was directed where buyer agreed to seller's confirmation of order (containing an arbitration clause) and accepted merchandise, despite the fact that the buyer did not sign the agreement. Under the circumstances, "the non-signing by the buyer of the agreement . . . is immaterial," said the court, referring to *Helen Whiting, Inc. v. Trojan Textile Corp.,* 307 N.Y. 360, and *Steinberg v. Goldstein,* 116 N.Y.S. 2d 6. *Stillwater Worsted Mills, Inc. v. Northampton Uniform Corp.,* N.Y.L.J., Sept. 17, 1954, p. 6, Levy, J.

ACCEPTANCE BY BUYER OF GOODS DELIVERED UNDER A SALES DOCUMENT (ACCEPTANCE OF ORDER) CONTAINING ON ITS BACK A REFERENCE TO THE ARBITRATION RULES OF THE NATIONAL FEDERATION OF TEXTILES, DOES NOT CONSTITUTE AN AGREEMENT TO ARBITRATE WHEN A PREVIOUS CONTRACT BETWEEN THE SAME PARTIES DID NOT CONTAIN AN ARBITRATION CLAUSE. The Federal District Court in Georgia therefore did not enforce a New York judgment entered upon an award, as issued without jurisdiction over the Georgia resident. The Circuit Court, in affirming, held that no contract containing an arbitration clause was entered since the original contract contained no such clause and the sending of the Acceptance of Order (with arbitration clause) was "an ineffectual attempt to change its [contract's] terms by unilateral action," but the judges unanimously "forbear to determine, or even consider" whether the arbitration agreement conferred jurisdiction on the New York court and the judgment in personam (not being served in New York but personally in Georgia) was void as "entered without voluntary appearance or valid service of process." *Deering, Milliken & Co. v. Drexler,* 216 F. 2d 116 (U. S. Court of Appeals, Fifth Cir., Oct. 29, 1954, Hutcheson, C. J.).

ARBITRATION CLAUSE COVERING "ANY DISPUTE IN THE CALCULATION OF NET PROFITS" DOES NOT BAR COURT ACTION for an accounting of profit of a joint construction venture since the clause limited arbitration to "mathematical disputes." Such interlocutory order denying a stay under sec. 3 of the Federal Arbitration Act was not regarded a final decision, namely a denial of an injunction from which an appeal lies (28 U.S. Code § 1292), and this decision was affirmed by a majority decision of the U. S. Supreme Court. *Baltimore Contractors, Inc. v. Bodinger,* 99 Lawyers Ad. Ed. 178 (Jan. 10, 1955).

ARBITRATION AGREEMENT BINDING UNDER COMMON LAW IN MINNESOTA. Railroad carriers in a pooling agreement of 1934 for a term of 99 years provided for arbitration of its revision when changed conditions of the movement of ore should render it inequitable. A judgment declaring the arbitration provisions a valid remedy was affirmed by the Supreme Court of Minnesota which stated that the Minnesota Arbitration Act preserves the common-law right of arbitration, that "arbitration has been looked upon with favor in this state both in the statutory and decision field," that if the parties by their agreement do not insist that the applicable law shall govern the decision, the arbitrators "may decide the dispute according to their own notion of justice." The court further held that the demand for arbitration has not to be in a specific form but has only to be "sufficiently described so as to be identifiable either from the contractual provision or with the aid of parol evidence if that be necessary." The court referred also to a statement in 3 Am. Jur., Arbitration and Award, § 154, where it is said: "It has been authoritatively stated that the entire proceedings of arbitration and award merely constitute a contract between the parties. At the time of the submission they agree to do what shall be awarded; and when the award is made, it is read into the original agreement." *Zelle v. Chicago & N.W.R. Co.,* 65 N.W. 2d 583 (Sup. Ct. Minn., July 2, 1954, Nelson, J.).

ARBITRATION CLAUSE IN VEHICLE FIRE INSURANCE POLICY BINDING ON NEW JERSEY COMPANY AND RESIDENT OF TEXAS, despite fact that vehicle caught fire in Arkansas where state law (Ark. Statutes 1947, § 66-509) makes arbitration and appraisal provisions of insurance policies void and not enforceable in that state. The transitory action by the insured, whose truck had caught fire in Arkansas, and who refused to submit his claim to arbitration, was dismissed as prematurely brought inasmuch as under Texas law the arbitration provision "is reasonable and valid and compliance with its terms is a condition precedent to suit." The court, who declared that "there is certainly nothing inherently wrong, immoral or against natural justice in arbitration agreements," did not believe there was "any legitimate interest [of Arkansas] in regulating the dealings between insurance companies and citizens of other states expressed in insurance policies written and delivered elsewhere. On the contrary, it seems to us that to so hold would be to give an unreasonable out-of-state scope to a statute, which we think was designed for the protection of Arkansas people." *Miller v. American Insurance Co. of Newark, N. J.*, 124 F. Supp. 160 (Dist. Ct. Ark., Aug. 20, 1954, Lemley, C. J.).

AMENDMENT TO MUNICIPAL CHARTER FOR COMPULSORY ARBITRATION OF DISPUTES WITH FIREMEN IMPROPER DELEGATION OF CITY COUNCIL'S LEGISLATIVE AUTHORITY. Initiative amendment of 1952 to the municipal charter of the City of Everett, Wash., providing for compulsory arbitration of disputes between the City and its firemen as to wages, pensions and working conditions is unconstitutional, as an unauthorized delegation of the City Council's legislative authority to a board of arbitrators. *Everett Fire Fighters, Local No. 350 v. Johnson,* 23 L. A. 757 (Wash. Sup. Ct. Jan. 7, 1955).

ARBITRATION CLAUSE IN REINSURANCE CONTRACT BETWEEN PENNSYLVANIA COMPANY AND PORTUGUESE REINSURANCE COMPANY ENFORCEABLE. A clause in a reinsurance contract between a Pennsylvania company and a Portuguese reinsurance company providing for AAA arbitration in New York was challenged as unenforceable inasmuch as under Pennsylvania law such contract with reinsurance companies not authorized to transact business in the United States would be invalid. The court, however, considered the contract governed by Portuguese law as the offer of the Pennsylvania company had been accepted in Lisbon, and stated that the Pennsylvania Statute (title 40 sec. 442) was intended merely to provide regulations of the reinsurance business for tax and other purposes. Moreover, the contracts were also valid in New York as not violating the public policy. The motion to stay the arbitration was therefore denied. *William Penn Fire Ins. Co. v. Companhia de Seguros a Mundial,* N.Y.L.J., Oct. 21, 1954, p. 6 and Dec. 6, 1954, p. 7, Benvenga, J.

II. THE ARBITRABLE ISSUE

QUESTION OF ARBITRABILITY CAN BE DETERMINED BY ARBITRATORS IN SINGLE PROCEEDING under a broad arbitration clause in a medical partnership agreement with an insurance group which provides that "in the event that a dispute shall arise as to whether or not a matter is arbi-

trable under this agreement, then such question shall be arbitrated in accordance with this paragraph." Said the court in granting a motion to compel arbitration: "The effect of this clause is not to provide for a separate arbitration on the question whether there is an arbitrable issue but rather to make certain that all matters, including that issue, would be arbitrated. In the circumstances the respondent may not now use the shield of their own creation as a sword upon which to impale the petitioners and prevent them from having a determination on the merits as to their rights under the contract." *Eastern Parkway Medical Group v. Health Insurance Plan of Greater New York,* 136 N.Y.S. 2d 443 (Dec. 15, 1954, McDonald, J.).

DISPUTE OVER DISCHARGE OF EMPLOYEE FOR ALLEGED MISCONDUCT IS ARBITRABLE despite the fact that NLRB has exclusive jurisdiction of dispute over discharge based on unfair labor practices. Arbitrators had jurisdiction to determine whether employer unjustly discharged employee for misconduct even though union also charged, in its grievance, that dismissal was for union activity. The collective bargaining agreement, to the extent that it relates to arbitration of disputes over discharges which are unfair labor practices under the Taft-Hartley Act, is inoperative and of no effect since NLRB has exclusive jurisdiction. *McAmis v. Panhandle Pipe Line Co.* 23 LA 570 (Kansas City, Mo. Court of Appeals, Dec. 6, 1954).

DISPUTE OVER RIGHT OF PARENT TO VISIT CHILD IS ARBITRABLE BUT COURT MAY DENY MOTION TO ARBITRATE WHERE ISSUE OF WELL-BEING OF CHILD IS OF PRIMARY INTEREST TO STATE. Though the right of custody was considered an arbitrable issue, under an agreement of the parents in *Hill v. Hill,* 199 Misc. 1035, 104 N.Y.S. 2d 755, an award regarding the right of visitation was not confirmed referring to *Waltman v. Waltman,* N.Y.L.J., Jan. 15, 1940, p. 221 (see 17 N.Y.U. L.Q.R. (1940) 626. The court denied therefore a motion to compel arbitration as to the right of visitation, as not properly a subject for arbitration. *Michelman v. Michelman,* 135 N.Y.S. 2d 608 (Nov. 30, 1954, Gold, J.).

WAGE DISPUTE HELD ARBITRABLE DURING WAGE REOPENING PERIOD OF CONTRACT WHICH CONTAINS NO-STRIKE CLAUSE AND ARBITRATION CLAUSE COVERING ALL DISPUTES OVER "MEANING, PERFORMANCE, NON-PERFORMANCE OR APPLICATION" OF CONTRACT WITHOUT EXCLUSIONS. Said the court: "It is apparent that the intention of the parties was to establish peaceful relations between them for at least a period of two years. This intention could be fulfilled only by the agreement to arbitrate all disputes and to prohibit any strike or lockout. However, if the wage dispute on reopening could not be adjusted and could not be arbitrated, the union would still be prohibited from striking. Thus, the wage reopening clause would have no force or effect. I cannot say that such was the desire of the parties. By the terms and the fair implication of the agreement, I am of the opinion that the dispute is within the scope of the arbitration clause." (*Matter of Berger,* 191 Misc. 1043, aff'd 274 App. Div. 788). *Beech-Nut Packing Corp.,* N.Y.L.J., Sept. 15, 1954, p. 10, Keogh, J.

DISPUTE OVER RIGHT OF EMPLOYER TO CONTRACT OUT WORK NOT ARBITRABLE WHERE CONTRACT MERELY REQUIRES EMPLOYER TO "INFORM" UNION OF INTENTIONS AND "EXPLAIN" REASONS FOR USING OUTSIDE CONTRACTORS. An arbitrable issue was therefore not presented, under the clause of the collective bargaining agreement providing for arbitration of disputes as to the interpretation or the facts involved in an alleged violation of contract, and a motion to direct arbitration was therefore denied. *Woytowicz v. Esso Standard Oil Co.*, N.Y.L.J., Nov. 17, 1954, p. 7, Benvenga, J.

DISPUTE OVER UNION'S LIABILITY FOR SUPPLYING UNDER-AGE EMPLOYEE NOT ARBITRABLE inasmuch as "the hiring of employees was under the exclusive control of the employer and . . . it had full opportunity to examine the employee's qualifications and reject anyone not satisfactory to it." Issue arose when union supplied an employee, under 18 years of age, whose later injuries resulted in a double workmen's compensation award. *Livingston v. Tel-Ant Electric Company, Inc.*, N.Y.L.J., Jan. 7, 1955, p. 7 and Jan. 31, 1955, p. 6, Matthew M. Levy, J.

EMPLOYEE'S SUIT FOR DAMAGES DUE TO EMPLOYER'S FAILURE TO RE-EMPLOY HIM AFTER STRIKE STAYED PENDING ARBITRATION, inasmuch as a party to a collective bargaining agreement providing for grievance and arbitration machinery has to exhaust these remedies before asking relief by courts, unless facts are shown which would excuse him from pursuing such remedies. Said the court, affirming a judgment for the company staying the court action: "This rule . . . is based on a practical approach to the myriad problems, complaints and grievances that arise under a collective bargaining agreement. It makes possible the settlement of such matters by a simple, expeditious and inexpensive procedure, and by persons who, generally, are intimately familiar therewith. . . . The use of these internal remedies for the adjustment of grievances is designed not only to promote settlement thereof but also to foster more harmonious employee-employer relations." *Cone v. Union Oil Co.*, 23 L.A. 620 (Cal. Dist. Ct. App., 2d Dist., Dec. 15, 1954, Fox, J.).

EMPLOYER'S RIGHT TO HIRE INDEPENDENT CONTRACTORS, DEPRIVING INSIDE EMPLOYEES OF WORK, NOT ARBITRABLE UNDER CLAUSE RESTRICTING ARBITRATION TO DISPUTES "AS TO WHETHER THE TERMS AND CONDITIONS OF THIS AGREEMENT HAVE BEEN PROPERLY APPLIED, ADMINISTERED, PERFORMED OR ENFORCED," where another clause reserved to management all other rights unless "specifically abridged, delegated or modified by other provisions of the agreement." The court therefore held the exercise of management rights not an arbitrable grievance, and stayed arbitration inasmuch as the union could not point out how the controversies involved an express qualification of management rights by other provisions of the agreement. *Carborundum Company v. Swisher, as President of United Chemical Workers, C.I.O.*, 134 N.Y.S. 2d 661 (Niagara County, Oct. 20, 1954, Munson, J.).

DISPUTE OVER UNION'S ALLEGED BREACH OF CONTRACT IN CALLING STRIKE NOT ARBITRABLE under a clause providing for arbitration of grievances of any "aggrieved employee." Said the court: "The crux of plaintiff's claim in the present suit is the fomenting and inciting of strikes by the Unions and officials and a claim for damages resulting from such alleged acts is obviously not covered by the agreement. The parties to the agreement having failed to provide for this contingency in their agreement, neither party can now urge arbitration as a condition precedent to filing of suit for breach of the contract by reason of any acts such as are complained of in the pleading." *Square D Co. v. United Electrical, Radio & Machine Workers of America,* 123 F. Supp. 776, Dist. Ct. Mich., July 23, 1954, Koscinski, D. J.).

DISPUTE OVER ALLEGED BREACH OF NO-STRIKE CLAUSE IS NOT ARBITRABLE UNDER ARBITRATION CLAUSE LIMITED TO INDIVIDUAL GRIEVANCES OVER APPLICATION AND INTERPRETATION OF CONTRACT PROVISIONS RELATING TO WAGES AND WORKING CONDITIONS. Said the court: "Arbitration both of the defendant's responsibility for the work stoppage and the amount of damage would be preferable to the resolution of these issues in this action. Absent agreement of the parties to submit to arbitration, however, it may not be ordered." *Bassick Company v. Bassick Local 229, International Union of Electrical and Machine Workers, CIO,* 126 F. Supp. 777 (D.C. Conn. Jan. 28, 1955, Smith, C. J.).

III. THE ENFORCEMENT OF ARBITRATION AGREEMENTS

AGREEMENTS TO ARBITRATE NOT ENFORCEABLE UNDER COMMON LAW IN ALASKA PRIOR TO AWARD. An employment contract for performance at a night club at Anchorage, Alaska which was made in California provided for arbitration of all controversies before the International Executive Board of the American Federation of Musicians, pursuant to sec. 1647.5 of the Labor Code of California. (Chap. 454 of the Laws of 1939.) This provision refers to the arbitration only of disputes arising under contracts between an employment agency and a person for whom such employment agency undertakes to secure employment. It obviously does not apply to other contracts. The General Arbitration Statute—sec. 1280 of the Code of Civil Procedure—does not apply to contracts "pertaining to labor." The court therefore felt it was bound by common law practice to deny arbitration "because the statute laws of Alaska make no provision whatever for arbitration." Under common law, agreements to arbitrate, until consummated by an award, will not bar a lawsuit. A motion to dismiss the court action was therefore denied. *Orrick v. Granell,* 14 Alaska Reports 94 (Dist. Ct. Alaska, Third Div., Anchorage, Nov. 25, 1952, Dimond, D. J.).

SETTLEMENT OF COURT ACTION AND FAILURE TO SEEK STAY CONSTITUTES WAIVER OF PARTY'S RIGHT LATER TO ARBITRATE MATTERS EMBRACED IN SETTLEMENT. *Berliner & Wolfman, Inc. v. Milton Kaufman, Inc.,* N.Y.L.J., Nov. 9, 1954, p. 7; Feb. 8, 1955, p. 7, Matthew M. Levy, J.

ARBITRATION ENFORCED UNDER SEC. 301 OF TAFT-HARTLEY LAW. Dispute over vacation pay and by-passing of grievance procedure in view of imminent closing of plant is arbitrable under broad arbitration clause referring to AAA Rules. Suit against union under Sec. 301 of Taft-Hartley Act for alleged breach of contract stayed pending arbitration, the court holding that the Taft-Hartley Act "has generated of its own force the remedy of compelling arbitration." *Wilson Brothers v. Textile Workers Union of America, CIO,* 23 LA 824 (D.C. N.Y., Dec. 15, 1954, Ryan, D. J.).

FEDERAL ARBITRATION ACT APPLIES TO COLLECTIVE BARGAINING AGREEMENTS. The exclusion clause of sec. 1 of the Federal Arbitration Act was considered applicable only to contracts of employment, not collective bargaining agreements. A lower court's decision to stay action pending arbitration was nevertheless reversed as the issue of the suit (alleged breach of no-strike clause) was not considered a grievance within the meaning of the collective bargaining agreement. Said the U.S. Court of Appeals, Sixth Cir.: "The hiring of the individual workmen who are employed in accordance with the collective trade agreement is the contract of employment" referring to *United Office & Professional Workers of America v. Monumental Life Ins. Co.,* 88 F. Supp. 602, *J. I. Case Co. v. National Labor Relations Board,* 321 U.S. 332, and *Lewittes & Sons v. United Furniture Workers of America,* 95 F. Supp. 851. A breach of the no-strike clause, however, was not considered a grievance within the meaning of the collective bargaining agreement and therefore did not constitute an issue "referable to arbitration under an agreement in writing for such arbitration" within the meaning of sec. 3 of the Federal Arbitration Act. An order staying the employer's action to recover damages for breach of a no-strike clause, pending arbitration, was therefore reversed. *Hoover Motor Express Co., Inc. v. Teamsters, Chauffeurs, Helpers and Taxicab Drivers, Local Union No. 327, A.F.L.,* 217 F. 2d 49 (Sixth Cir. Nov. 23, 1954, Allen, C. J.).

SUIT BY MEAT-PACKING COMPANY AGAINST UNION FOR ALLEGEDLY ORDERING SLOWDOWN CANNOT BE STAYED PENDING ARBITRATION UNDER FEDERAL ARBITRATION ACT. The court held that the exception clause of sec. 1 of the Act, providing that nothing contained therein shall apply to "contracts of employment" of any "class of workers engaged in interstate commerce," barred the use of the Act to stay a suit and direct arbitration under the Act. *Commercial Packing Company, Inc. v. Butchers Union Local No. 563,* 23 L.A. 449 (U.S. Dist. Ct. S.D. Cal., Aug. 6, 1954, Tolin, D. J.).

FEDERAL ARBITRATION ACT APPLIES TO PLANT SUPERINTENDENT WITH MANAGERIAL DUTIES AND EARNING $15,000 PER YEAR. Such a person does not belong to "any class of workers" whose contracts are exempted from the scope of the Act since superintendent's functions are "fundamentally different." Action to recover damages for alleged wrongful discharge was therefore stayed pending arbitration. *Bernhardt v. Polygraphic Co. of America, Inc.* 23 U.S. Law Week 2365 (U.S. Ct. App. Second Cir., Jan. 19, 1955, Frank, J.).

ARBITRATION CLAUSE HELD TO IMPLY NO-STRIKE PROVISION. An action for damages caused by strike was held appropriate in principle. A union had refused to arbitrate a dispute over transfer of an employee from a truck to a loading platform at a lower rate of pay. A strike over this issue was deemed by the employer a breach of the contract which included a provision for arbitration which "shall be the exclusive means of adjudicating all matters." Though the contract did not contain a specific no-strike provision, the language of the arbitration clause was held not ambiguous, aand the court ruled as its meaning "that there should be no strike as to any matter appropriate under the agreement to be arbitrated, at least when the employer was not in default as to its own observation of the arbitration requirement." The court found that the word "exclusive" in the arbitration clause was incorporated "to deny the State Board as a means of settling disputes. It was also to prevent the Union's calling a strike as a means of settling disputes. At the same time the clause did not mean that a wildcat strike would automatically be a breach of contract, and the clause was intended as a compromise which protected arbitration and at the same time kept the objectionable words 'no strike' out of the agreement." An action of the employer seeking damages caused by the strike was thus determined appropriate in principle whereby the question of damages itself would be dealt with by the court "at a later date." *Mead v. International Brotherhood of Teamsters, Local Union, No. 25, A.F.L.,* 126 F. Supp. 466 (U.S. Dist. Ct. D. Mass., Dec. 2, 1954).

COURT ACTION INITIATED BY INDIVIDUAL MEMBERS OF UNION STAYED PENDING ARBITRATION. Said the court: "The agreement requires that the parties arbitrate all breaches and claimed breaches arising thereunder. The union members, as parties thereto and relying thereon, may not disregard the provisions of the agreement relating to arbitration." *Seaboard Terminal and Refrigerator Company v. Popek,* N.Y.L.J., Sept. 21, 1954, p. 6, Gavagan, J., *Seaboard Terminal and Refrigerator Company v. Adams,* N.Y.L.J., Oct. 2, 1954, p. 6, Aurelio, J.

SUIT BY INDIVIDUAL EMPLOYEE WILL NOT BE STAYED PENDING ARBITRATION WHERE ENFORCEMENT OF ARBITRATION CLAUSE IS SOLELY THE RIGHT OF THE UNION. A discharged employee who may not individually compel arbitration when union refused to do so (see Arb. J. 1954 p. 217), may not be charged with failure to obtain arbitration within the time limit of the collective bargaining agreement with District No. 15, International Association of Machinists, A.F.L. The employee's action to recover damages for alleged wrongful discharge may therefore not be stayed, inasmuch as the enforcement of the arbitration clause was solely a right of the union which could not be exercised by an individual employee, thus distinguishing the cases of *River Brand Rice Mills v. Latrobe Brewing Co.,* 305 N.Y. 36, and *Ott v. Metropolitan Jockey Club,* 307 N.Y. 696, where the respective plaintiffs had the right to demand arbitration within a fixed time limit since expired. Only the motion to stay in view of the arbitration clause was denied, without the court determining whether plaintiff may maintain the direct action as third-party beneficary of the collective bargaining agreement. *Parker v. Borock,* 136 N.Y.S. 2d 588, (Oct. 20, 1954, Colden, J.).

COURT ACTION WILL BE SUSPENDED, NOT FINALLY DISMISSED OR DISCONTINUED, PENDING AN AWARD WHICH DISPOSES OF THE DISPUTE. "It has been stated that a submission of a cause to arbitration operates as a discontinuance of an action pending in court, unless the parties indicate a contrary intention in their submission and that a suit may merely be suspended during the time required to execute the arbitration and until the award is made. . . . Where all issues presented in an action are referred to arbitration and the action is stayed by order of the court, it seems no more than logical that the action should be dismissed or at least deemed discontinued upon the confirmation of the award and the entry of the judgment thereon. By the same token, where all matters embraced in the action have not been referred to arbitration, or where, as here, the parties have stipulated on the record before the arbitrators to withdraw one of the arbitrable disputes from immediate arbitration, there is no basis either for dismissing the complaint or deeming the action discontinued. The stay of such action will merely remain operative pending the arbitration of the unresolved dispute." *Joseph F. Mittelman Corp. v. Murray L. Spies Corp.*, 134 N.Y.S. 2d 223 (Aug. 9, 1954, Colden, J.).

ACTION WILL NOT BE STAYED PENDING ARBITRATION WHERE APPLICANT FOR STAY FAILS TO SEEK COURT ENFORCEMENT OF AWARD UNDER CALIFORNIA LAW. Union which did not seek court enforcement of an Impartial Chairman's award but called a strike was not considered entitled to a stay of the employer's action for damages pending arbitration. Sec. 1284 of the California Code of Civil Procedure provides for a stay of court action only when "the applicant for stay is not in default in proceeding with such arbitration." Court enforcement of the award, as stated by the court, is "part of the arbitration." *Leon v. International Ladies' Garment Workers' Union*, 23 L.A. 675 (Cal. Super. Ct. Los Angeles County, Dec. 17, 1954, Whyte, J.).

ISSUE OF TIMELINESS OF DEMAND FOR ARBITRATION CANNOT BE RAISED IN COURT ACTION AFTER ENTERING OF JUDGMENT UPON AWARD. An argument that a demand for arbitration was not timely was refuted by a court and parties were directed to proceed to arbitration (see Arb. J. 1954, p. 110). The issue of timeliness was again raised in a later action between the same parties, but the court held that judgment in the earlier action is conclusive under the doctrine of collateral estoppel. *Creter v. Davies*, 107 A. 2d 17 (Super. Ct. New Jersey, App. Div., July 2, 1954, Clapp, S. J. A. D.).

AWARD UPHELD UNDER ILLINOIS LAW DESPITE DISSOLUTION OF CORPORATION since Illinois Statute (Ch. 32 § 157.94) permits such action if commenced within two years of dissolution. The Illinois corporation had been a party to a sales agreement providing for arbitration in New York. A court held that a judgment entered upon an award rendered against the defaulting Illinois party should not be vacated as requested by the Illinois corporation's liquidator, inasmuch as the Illinois Statute intends "to preserve all remedies available to a contract creditor anywhere under the terms of his contract, and not merely remedies available in Illinois under Illinois law."

The fact that Illinois does not recognize the enforcement of future arbitration clauses, was considered immaterial. Said the App. Div. unanimously: "The contracts provided for their construction under New York law. Our policy favors arbitration, and the clauses providing for arbitration of future disputes here were enforceable. In *Gantt v. Felipe Y. Carlos Hurtado & Cia.*, 297 N.Y. 433, 79 N.E. 2d 815, the law of place of performance of the arbitration agreement (New York) was considered to be determinative of the validity of a provision for arbitration, as such provision was said to relate to the law of remedies." *Republique Francaise v. Cellosilk Mfg. Co.*, 284 App. Div. 669, 134 N.Y.S. 2d 470 (First Dept. October 26, 1954, Callahan, J.).

IV. THE ARBITRATOR

ARBITRATION DIRECTED DESPITE DEATH OF PARTY-APPOINTED ARBITRATOR PRIOR TO HIS PARTICIPATION IN SELECTION OF THIRD MEMBER OF BOARD OF ARBITRATION. A separation agreement provided for arbitration of differences as to earnings of one of the parties before a tri-partite board. The arbitrator appointed by one of the parties died prior to selection of impartial arbitrator. Court held that this did not revoke the arbitration agreement since the contract did not specifically so provide. The court further stated that the arbitration provision is severable and divisible (*Am. Surety Co. v. Rosenthal,* N.Y.L.J., June 18, 1954 p. 7), because one part of that provision unqualifiedly requires arbitration of any dispute while another part deals with the selection of arbitrators. *Oursler v. Oursler,* N.Y.L.J., Nov. 4, 1954, p. 7, Benvenga, J.

ARBITRATOR IS SOLE JUDGE OR RELEVANCE OF EVIDENCE. Motion to stay arbitration because an arbitrator had allowed evidence pre-dating employee's union membership was denied, the court holding that such questions may properly be decided by an arbitrator, whose award would later be subject to review as to excess of authority. In any event, the disputed fact would be immaterial, in the opinion of the court, inasmuch as the union would, under sec. 705(1) of the State Labor Act, be entitled to represent all employees whether members of the union or not. *Local 32B, Building Service Employees Internat. Union, v. 205-9 West 107th Street Realty Corp.*, N.Y.L.J., Dec. 27, 1954, p. 5, Di Falco, J.

ARBITRATOR IS SOLE JUDGE OF RELEVANCE OF EVIDENCE. Award was confirmed despite claim by party that arbitrator did not admit evidence of defective merchandise. Said the court: "Ordinary rules of evidence do not hold in the case of an arbitration, and a court does not sit in review upon an arbitrator's ruling as to the relevancy or materiality of evidence. Only perverse misconstruction or positive misconduct on the part of the arbitrator is ground for the setting aside of an award (*Matter of Wilkins,* 69 N.Y. 494)." *Astra Trading Corp. v. Samuel Barotz & Co.*, N.Y.L.J., Nov. 17, 1954, p. 9, Byrnes, C. J.

IN FIXING FEES FOR ARBITRATOR, COURT DECLINES TO GIVE CREDIT FOR TIME SPENT BY ARBITRATOR IN CONFERENCES

AND HEARINGS ON A MOTION TO REMOVE ONE OF THE OTHER ARBITRATORS, court holding that such time spent by arbitrator was "without merit" and "wholly unnecessary." *Richmond Asbestos Co., Inc. v. George C. Fuller Cont. Co., Inc.*, N.Y.L.J., Nov. 29, 1954, p. 13, Ritchie, J.

V. ARBITRATION PROCEEDINGS

COURT ACTION WILL BE STAYED PENDING ARBITRATION ONLY WHERE PARTY SHOWS THAT HE SOUGHT ARBITRATION. Court action will not be stayed where party fails to move to compel arbitration. *Or-Di Const. Corp. v. J. R. Stevenson Corp.*, N.Y.L.J., Dec. 22, 1954, p. 6, Frank, J.

SUPREME COURT WILL NOT STAY ACTION PENDING ARBITRATION WHERE MUNICIPAL COURT, ON SAME PARTY'S PETITION FOR STAY, HELD THAT THE ISSUE OF ARBITRATION IS TO BE DECIDED UPON TRIAL. The Supreme Court held that the disposition in the Municipal Court is "the law of this case because there is no change of facts since the matter was first decided (*Berwin v. Am. Safety Razor*, 117 N.Y.S. 2d 727)." *Strong v. Tague*, N.Y.L.J., Dec. 23, 1954, p. 6, Brenner, J.

ARBITRATION NOT BARRED BY PROCEEDINGS PENDING BEFORE N.L.R.B. An employer held, as escrowee, funds which were essentially in dispute between two competing local unions. The employer's implicit invitation to negotiate was not accepted by the union which demanded arbitration a few days later although the collective bargaining agreement provided that any dispute should first be taken up for adjustment by representatives of the parties. An order staying the arbitration as having been prematurely initiated was affirmed by a majority decision (3:2), the dissenting judges holding also that proceedings pending before the National Labor Relations Board for an election and certification of a rival union as collective bargaining agent should not deprive the union of its contractual right to arbitration. *Jay Kay Metal Specialties Corp. v. United Service Employees Union, Local 377, C.I.O.*, 285 App. Div. 81, 135 N.Y.S. 2d 562 (First Dept. Dec. 7, 1954).

VI. THE AWARD

ARBITRATORS NEED NOT ENUMERATE SEPARATE FINDINGS UNLESS REQUIRED TO DO SO BY SUBMISSION, PROVIDED ALL ISSUES SUBMITTED ARE DISPOSED OF IN THE AWARD. This was the holding of the Supreme Court of Mississippi in confirming awards in a dispute between a subcontractor and the State Building Commission under a contract for installation of plumbing and heating. The court referred to 3 Am. Jur. p. 944, which says "there need not be an express finding on each particular point, if all are included either expressly or by necessary implication, for the duty of arbitrators ordinarily is satisfied if they find generally in such a way as substantially to cover all questions embraced in the submission which have been presented to them and not withdrawn by the parties." *Horne v. State Building Commission*, 76 Southern Rep. 2d 356 (S. Ct. Miss., Dec. 20, 1954, Hall, J.).

ARBITRATORS NEED NOT GIVE REASONS FOR THEIR AWARDS AND COURTS WILL NOT QUESTION JUDGMENT OF ARBITRATORS. In an arbitration of a dispute on the construction of a public garage, a panel of five arbitrators directed the contractor to obtain a certified statement from the architect named in the building contract as to the date of satisfactory completion of the garage. A majority award stated that it was not only based on the architect's certificate but on the weight of the evidence submitted and upon the arbitrators' examination of the building. The award was challenged on the score that the majority arbitrators abdicated their responsibilities, but the court pointed out that the request upon the architect was made with full notice to all of the interested parties, and that the company was specifically accorded and availed itself of the opportunity to reply to the architect's statement. In referring to the case of *Shirley Silk Co. v. American Silk Mills, Inc.*, 275 App. Div. 375, 13 N.Y.S. 2d 309, whereby an arbitrator "is a quasi-judicial officer . . . not to be called upon to give reasons for his decision," the court in confirming the award said: "Were the rule otherwise, the judgment of the court would be substituted in the place of the arbitrators' award, and arbitration instead of being a substitute for legal process and procedure would become but the first step in the course of litigation." *Wark & Company v. Twelfth & Sansom Corp.*, Sup. Ct. Pa. E.D., Sept. 27, 1954, Jones, J.).

UNANIMOUS PARTICIPATION OF TRI-PARTITE ARBITRATION BOARD NOT NECESSARY FOR CONFIRMATION OF AWARD UNDER RAILWAY LABOR ACT. Court upheld majority award despite failure of third member of Board of Arbitration to participate in final conference, saying: "Obviously, everyone assumed that the majority of the Board had made a final award which negatived any purpose of further deliberations and consultation, and no one contends that any further deliberation would have had the remotest possibility of changing the decision. The provisions of the Railway Labor Act with reference to arbitration necessarily recognize that the partisan members will champion the position of their respective employers. Consequently therefore, if the Chairman of the Board agrees as to the disposition of these claims with either the railroad member or the Brotherhood member, such decision necessarily becomes the ultimate disposition of the arbitration." *Duluth, Missabe and Iron Range Railway Company v. Brotherhood of Railroad Trainmen,* 124 F. Supp. 923 (Distr. Minn., Sept. 30, 1954, Nordbye, C. J.).

FILING OF ARBITRATION AGREEMENT AND CORRESPONDENCE ON SELECTION OF ARBITRATORS NOT NECESSARY AT FILING OF MOTION TO CONFIRM AWARD under California law (Code of Civ. Proc. sec. 1291) where documents were before court (Superior Court, Yuba County, Calif.) at time motion to confirm was heard. The Dist. Ct. of Appeals, in affirming, referred to *In re Verly Bldg. Corp.*, 264 App. Div. 885, 35 N.Y.S. 2d 891, and *Pleaters & Stitchers Assn. v. Davis,* 140 Cal. App. 403, 35 P. 2d 401, and said: "The design (of statutory arbitration provisions) was to avoid useless proceedings and make the practice simple and as speedy as would be consistent with justice." *Accito v. Matmor Canning Co., Inc.*, 276 P. 2d 34 (D.C. App. Third Div., Nov. 10, 1954, Peek, J.).

ARBITRATOR EXCEEDED AUTHORITY IN DENYING EMPLOYERS' RIGHT TO TERMINATE AGREEMENT ON ITS EXPIRATION DATE AFTER DUE NOTICE since, in extending the life of the contract, the arbitrator "rewrote it" in violation of a contractual provision. The collective bargaining agreement required 60 days notice of termination aand contained a further provision that a new agreement be "retroactive to the expiration date." An arbitrator ruled that the employer did not have the right to unilaterally terminate the contract at its expiration date when a new contract had not been completed. The Superior Court of Los Angeles modified this decision inasmuch as the arbitrator exceeded his authority, and the court's decision was affirmed by the California District Court of Appeals, Second District. *Flores v. Barman,* 279 P. 2d 81 (Cal. App. Second District, Jan. 20, 1955, Vallee, J.).

COURT WILL CORRECT AWARD INSOFAR AS IT EXCEEDS AUTHORITY OF ARBITRATOR RATHER THAN VACATE IT IN ENTIRETY WHERE SUCH CORRECTION IS POSSIBLE "WITHOUT DOING AN INJUSTICE." Court correction of a wage reduction award rather than vacating it (See Arb. J. 1954 p. 110) was upheld on a motion for reargument in a majority (3:2) opinion of the Connecticut Supreme Court of Errors. *Textile Workers Union v. Cheney Brothers,* 109 A. 2d 240 (Nov. 9, 1954, Inglis, C. J.).

AWARD CONFIRMED INSOFAR AS IT UPHOLDS UNION GRIEVANCE WITH RESPECT TO POSTING OF NOTICE ON BULLETIN BOARD. Further award by arbitrators to the effect that employer may seek removal of objectionable material in the future from bulletin board was not confirmed since it went beyond the scope of submission agreement, which limited award to granting of the grievance without relief. *Prudential Insurance Company of America v. Insurance Agents' International Union, A.F.L.,* N.Y.L.J., Oct. 29, 1954, p. 7, Brisach, J.

AWARD INVALID WHEN NOT MADE WITHIN THIRTY DAY TIME LIMIT REQUIRED UNDER RULES OF NEW JERSEY BOARD OF MEDIATION. Arbitration hearing of propriety of employee's discharge closed on date on which last brief was filed, and not on subsequent date on which arbitration board met to consider briefs and evidence, where, under New Jersey Board of Mediation Rules, hearings are declared closed as of the final date for receiving briefs. *Public Service Co., v. Utility Workers,* 23 LA 326 (New Jersey Superior Court, Essex County, Aug. 11, 1954, Waugh, J.).

AWARD FOR REINSTATEMENT OF EMPLOYEE DISCHARGED AS COMMUNIST REVERSED, the court holding such reinstatement would be contrary to public policy as expressed in Smith Act of 1948, the Internal Security Act of 1950, the Communist Control Act of 1954, and other laws. Arbitrator had directed reinstatement of employee discharged for alleged employment application misrepresentation and communist affiliations. Lower court upheld award on showing that real reason for discharge was union activities. *Black v. Cutter Laboratories,* 23 L.A. 715 (Sup. Ct. Cal., Jan. 19, 1955, Schauer, J.).

AWARD REQUIRING EMPLOYER TO CONTRIBUTE TO UNION WELFARE FUND IS VALID despite fact that some employees are non-members of the union, where employer obligates himself in collective bargaining agreement to make contributions for all employees subject to the contract. *Martinelli v. Furniture Workers Union,* N.Y.L.J., Sept. 23, 1954, p. 9, Keogh, J.

AWARD OF TWO WEEKS' VACATION, GIVING CERTAIN EMPLOYEES CREDIT FOR SERVICE WITH A PREVIOUS EMPLOYER, CONFIRMED AS WITHIN ARBITRATOR'S AUTHORITY. A decision of a lower court (digested in *Arb. J.* 1954, p. 60) was reversed, the court ruling an award may be set aside for errors of law where the arbitrator meant "to decide the case according to law." However, the court continued, "where an arbitrator has meant to decide the case not according to the law but according to his own concept of what is just and right, the court will not interfere." The court stated in conclusion that "an arbitration should be an end to litigation, not a beginning of it." *Collingswood Hosiery Mills, Inc. v. American Federation of Hosiery Workers,* 31 N. J. Super. 466, 107 Atlantic 2d 43 (Super. Ct. of New Jersey, App. Div., July 2, 1954, Clapp. S.J.A.D.).

AWARD UPHELD DESPITE CLAIM CONTRACT CONTAINING ARBITRATION CLAUSE WAS ILLEGAL, the court holding that the time to test the contract was before arbitration. A controversy on royalty payments under a patent license agreement was referred to three arbitrators who examined a great deal of evidence in proceedings in which each of the parties was represented by counsel. The arbitrators held that the licensee's claim that the contract was illegal and unenforceable because of restrictions on the manufacturing and selling of competing devices was raised too late. In confirming a majority award in favor of the licensor, the court held that if the licensee wished to test the legality of the contract, he should have brought an action to rescind and could have refused to arbitrate, thus forcing the licensor to compel the licensee to arbitrate, pursuant to sec. 12148-1 of the Ohio General Code. Said the Supreme Court of Ohio: "It is the policy of the law to favor and encourage arbitration and every reasonable intendment will be indulged to give effect to such proceedings and to favor the regularity and integrity of the arbitrator's acts." *Campbell v. The Automatic Die Products Company,* 104 U.S. Patent, Trade Mark and Copyright Weekly Reports 77 (Zimmerman, J., December 15, 1954).

ARBITRATOR MAY AWARD INTEREST ON CLAIM AND ADMINISTRATIVE FEES even when not specifically asked to do so in the demand for arbitration, where arbitration was had under the Rules of the American Arbitration Association. The App. Div. Second Dept. unanimously affirmed the judgment digested in Arb. J. 1954 p. 172. *C. F. Simonin's Sons, Inc. v. Antonio Corrao Corp.,* N.Y.L.J., March 8, 1955, p. 10.

AN EDITORIAL

(*Continued from Page* 1)

ment of employees accused of being pro-Communist have been so charged with emotional overtones and misunderstandings as to becloud the true proportions of the problem and at times to jeopardize the process of voluntary arbitration itself.

Perhaps this is a suitable occasion to re-state two fundamental principles: The first is that industrial plants vital to American defense must be kept free of security risks; the second is that in arbitration, no less than in other forms of administration of justice, charges must be precisely formulated and carefully proved.

The papers of Professor Healy and Mr. Roberts deal with different subjects but both have this in common: they point up the important fact that the arbitrator's frame of reference is the collective bargaining agreement. His is a judicial function, limited to interpretation of the contract as written by the parties or affected by law. Arbitrators do not write the contracts, nor do they formulate the laws and regulations of the land. Defects in draftsmanship of seniority clauses must be corrected by the parties in negotiation; by the same token, weaknesses and inconsistencies in the body of laws and administrative regulations which deal with employment of Communists must be overcome not in arbitration but in the appropriate legislatures and governmental agencies.

FORM OF BEQUEST

I give, devise and bequeath to the American Arbitration Association, Inc. in New York .....

.....

.....

(Insert the amount of money bequeathed, or a description either of specific personal or real property, or both, given, or if it be the residue of an estate, state the fact.)

NOTE: *All contributions to AAA by gift or membership enrollment are tax exempt.*